IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID CONVENTION

In the Matter of Arbitration Between:	
MOBIL INVESTMENTS CANADA, INC., Claimant,	ICSID Case No. ARB/15/6
and	
GOVERNMENT OF CANADA, Respondent.	
	Volume 4

HEARING ON JURISDICTION, MERITS AND QUANTUM

Friday, July 28, 2017

The World Bank
1818 H Street, N.W.
Conference Room 4-800
Washington, D.C.

The hearing in the above-entitled matter came on at 9:00 a.m. before:

PROF. CHRISTOPHER GREENWOOD, Q.C., President

DR. GAVAN GRIFFITH, Co-Arbitrator

MR. J. WILLIAM ROWLEY, Q.C., Co-Arbitrator

ALSO PRESENT:

MS. LINDSAY GASTRELL
Secretary to the Tribunal

MR. ALEX KAPLAN
Legal Counsel

Court Reporter:

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT GREENWOOD: Good morning, ladies and gentlemen. Now we want a nice, clean fight today.

Let me just run through the housekeeping matters.

The notional timetable for today is you have three hours each, less 15 minutes or so for coffee. You're not obliged to use it all, and we arranged that we would start at 9:00 and break for lunch at 12:00 and then go from 1:00 until 4:00 for the counter-response.

Now, if either of you want to suggest a change to that timetable, for example, if you think you're definitely not going to need to so long or if Canada wants a longer break before it starts, now is the time to say so, please.

MR. O'GORMAN: Mr. President, I would be surprised if we would require the entire time for our closing. I think probably the order of one-and-a-half or two hours might be more reasonable under the circumstances.

PRESIDENT GREENWOOD: That's allowing for questions, is it?

MR. O'GORMAN: That depends how many questions you have.

(Laughter.)

PRESIDENT GREENWOOD: Mr. Luz?

MR. LUZ: I'm sure we will be able to accommodate, depending on how many questions the Tribunal has, which I'm sure there will be many, but I think Canada will be able to finish its presentation well within the parameters that we have now, so I don't think we will be rushing to the airport.

PRESIDENT GREENWOOD: Don't misunderstand us, we're not going to the airport anyway. The 4:00 finish was so that we had time to deliberate this afternoon and we're going to continue deliberating into the evening, but I wanted to make sure that you haven't sort of confronted the facts and the law and decided you needed a lot longer or you needed far less.

If, for example, you finish at 11:00, we will

stop then and we'll take longer over lunch, I think that is a fair approach. I'm not expecting somebody to get straight on their feet and reply.

MR. LUZ: I was just going to make the request, Mr. President.

PRESIDENT GREENWOOD: Though I may say I have been put in the position in the days when I was counsel of having to do just that. Sometimes it's better, you get it over with quickly.

All right. Well, thank you very much. Let's move straight, in that case, to Mobil's closing submissions.

MR. O'GORMAN: We have a PowerPoint that my colleague Katie will hand out.

PRESIDENT GREENWOOD: Thank you.

ARBITRATOR ROWLEY: Same artwork.

MR. O'GORMAN: Yes, indeed.

(Pause.)

CLOSING ARGUMENT BY COUNSEL FOR CLAIMANT

MR. O'GORMAN: Mr. President, Dr. Griffith, Mr. Rowley, let's look at the facts where they stand today.

Canada is in admitted breach of NAFTA Article 1106. That breach continues to this day. Canada is under a duty to make full reparation under NAFTA and international law. Canada has not made that reparation to Mobil in redress of this admitted breach.

Now, today, I will focus my remarks on limitations and res judicata as requested by the Tribunal.

First, Canada's position on limitations would lead to an unjust result. According to Canada, the future damages that Mobil sought in Mobil I were "too early" as they were not incurred.

Second, the damages that have since been incurred and claimed for in this case, according to Canada, are time-barred and "too late."

The effect of Canada's proposed interpretation of Article 1116 is that Mobil cannot recover damages for the period at issue in this case, 2012 through 2015, nor by implication through to 2040 and beyond such damage to be caused by the Guidelines.

PRESIDENT GREENWOOD: Mr. O'Gorman, I will make my first interruption.

Could you just set out for us what exactly is Mobil's position about damages from 2016-2017 through to 2040? You're claiming in this case with respect to the period from admittedly are two different start dates in 2012.

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: Through to the time of the arbitration.

What is your position about the future?

MR. O'GORMAN: As you note, sir, the damages from 2016 through on to 2040, assuming the breach continues, which is unknowable until it does, would be required to be claimed in successive proceedings brought within three years of the damages being incurred as instructed by UPS. Since those damages--following the reasoning of the Mobil I Tribunal, those damages are not requested in this case--that is, from 2016 through 2040.

PRESIDENT GREENWOOD: All right. Thank you very much.

MR. O'GORMAN: Turning to Canada's position on res judicata, that position seeking the dismissal of this case, would also lead to an unjust result. The Mobil I Tribunal did not decide future damages. Nevertheless, Canada argues here that the First Tribunal ought to have determined on the merits the matters before it, including compensation for future damages.

Therefore, Mobil I's express decision not to reach compensation for future damages, according to Canada, amounts to a denial and is, therefore, a decision on the merits. We disagree. Canada's res judicata argument would, in fact, turn the Mobil I Decision on its head.

Now, let's turn to a very short roadmap for today's Hearing: Limitations and, of course, res judicata.

So, let's turn to limitations and give you a very brief overview of that argument.

First, I'm going to talk about the text of the NAFTA and go on and speak about continuing breach case law. Mr. Chairman, if you'd just forgive me, I

have a bit of a scratchy throat today. So, if you'd just indulge me.

PRESIDENT GREENWOOD: I understand. Consider yourself indulged, and do make sure you have plenty of water.

MR. O'GORMAN: Yes, thank you very much.

PRESIDENT GREENWOOD: Do you have a glass to drink from? It's often easier than trying to drink from a bottle when you're speaking.

MR. O'GORMAN: Yes. Maybe someone can get one for me.

(Pause.)

MR. O'GORMAN: After the continuing breach discussion--thank you, Dr. Griffith--we will talk about Canada's valuation fallacy with respect to the damage model in the first case, and then go on to talk about Mobil's alternative case on limitations, and finally abuse of right.

So, first, let's talk about the text of NAFTA, in particular 1116(2) and 1117(2).

ARBITRATOR GRIFFITH: I shouldn't interrupt, and I don't intend to ask many questions, but I'm

reminded by Justice Scalia when I first met him in 1985, he was against using extrinsic materials to interpret statutes, but he showed me a cert application that he had just read that morning saying: "Unfortunately, absent of any assistance from the extrinsic materials it is necessary to resort to the terms of the statute itself."

MR. O'GORMAN: A novel concept, certainly.

As you recall, 1116(2) and 1117(2) are parallel provisions with respect to claims by the investor on its own behalf and claims by the investor on behalf of the enterprise. Both of those claims are before the present case. For purposes of the limitations discussion, I will focus primarily on 1116(2), as the operative language of those two is identical.

PRESIDENT GREENWOOD: I take it that's common ground between the Parties, that there is no practical difference between 1116(2) and 1117(2)? It would make the sentences less cumbersome if we can agree on that.

MR. LUZ: There is no need to distinguish in

this case for that.

PRESIDENT GREENWOOD: Thank you, Mr. Luz.

Mr. O'Gorman, please continue.

MR. O'GORMAN: Thank you.

Article 1116 itself, which is entitled "Claim by an Investor of a Party on its own Behalf," provides both when a claim may be brought and when a claim may not be brought. If you look at Article 1116(1), it provides When a claim and is too early to be brought. It provides: “An investor of a party may submit to arbitration under this Section a claim that another Party has breached an obligation under [Chapter Eleven] and that the investor has incurred loss or damage."

Similarly, 1116(2) picks up on the incurred loss or damages claim and provides for a three-year period to bring such claims based on some other factors that we will discuss.

As you know, NAFTA itself, in Article 1116(2) in particular, must be interpreted in accordance with Applicable Rules of international law. That's set forth in Article 102(2) of the NAFTA regarding the

Parties to interpret and apply the provisions in accordance with Applicable Rules of international law, as well as Article 1131(1), which provides direction to the Tribunal to decide disputes in accordance with the Agreement and Applicable Rules of international law.

Additionally, expressly under the NAFTA, 1116(2) must be interpreted in light of NAFTA's objectives. Again, Article 102(2) requires that all provisions be interpreted and applied "in light of NAFTA's objectives," including to eliminate barriers to trade in, and facilitate the cross-border movement, importantly for this case, of services, it having been determined by the Mobil I Case that services were the subject of the illegal-performance requirement.

And, also, the objective is to create effective procedures for the implementation and application of NAFTA and in particular for the resolution of disputes; and, of course, for the resolution of disputes would imply the just and fair resolution of disputes.

Both provisions of Article 1116, that is, Sub (1) and Sub (2), should be interpreted and applied harmoniously. As evidenced in Article 1116, NAFTA harmonized the concept of when the claim can be brought with the concept of when the claim may not be brought. These two concepts of incurred loss are complimentary (sic) to one another, and, of course, appear under the same heading claimed by an investor of a party on its own behalf.

PRESIDENT GREENWOOD: Do you think you meant complementary rather than complimentary?

MR. O'GORMAN: Yes. Thank you.

I continue to be very impressed by your precision, Mr. Chairman.

And both of those clauses expressly state the phrase "has incurred loss or damage."

Now, NAFTA provides a claim can only be brought with respect to loss or damage already incurred. That is the fundament of 1116(1). At the same time, it provides that a claim may be time-barred if more than three years have elapsed after the date of the loss that the damage has been

incurred, which is 1116(2).

Consequently, the NAFTA Parties could not have intended the result where the provisions of Article 1116 operate so as to bar the investor from bringing a claim for future damages that have not been incurred or to bar the investor from bringing a claim once the future damages have been incurred based on limitations.

Article 1116(2) is based on the alleged breach, not the Measure. Now, that's an important distinction. I think during the course of the Hearing, we've heard from Canada that somehow it triggers off the Measure itself. It doesn't. Article 1116(2), instead, tracks breach, not measure. As Professor Sarooshi noted, “it is not the measure as Canada says that counts for Articles 1116(2). . ., but rather knowledge of the alleged breach.” As a corollary to this, the investor's knowledge of the Measure in question does not, by itself, trigger the limitations period.

Now, of course, 1116(2) has a temporal requirement, it provides an investor may not make a

claim if more than three years have elapsed from the date the investor first acquired knowledge of breach and loss. As a corollary to that, if less than three years have elapsed from the date that is relevant to the claim, 1116(2) does not prevent the investor from making the claim.

Moreover, 1116(2) has a knowledge requirement that tracks and requires the knowledge of the alleged breach and knowledge of loss and damage. As a necessary corollary to that, unless and until the investor acquires or should have acquired knowledge, the limitations period has not been triggered.

The knowledge requirement itself--

PRESIDENT GREENWOOD: Mr. O'Gorman, I'm sorry to interrupt you. I would just like to try and tease out precisely what Mobil's position is on this.

Now, are you arguing that each payment made under the Guidelines, each time a check was written for an Incremental Expenditure, it's only at that moment that you acquire knowledge--first of all, is that a separate breach? And, secondly, is that the moment at which you acquire knowledge of the loss or

damage?

MR. O'GORMAN: Yes, yes. And the reason why that is, is because in the notion of a continuing breach, the investor does not know if it will be required to write a check or if the Guidelines will be continued into force until literally the day you write the check.

Now, that is bounded by the instruction from UPS that stale claims cannot be made, and that any damages incurred under a continuing breach are limited to those within three years of when a Notice of Arbitration is brought, and that is the reasoning of UPS, to avoid and protect the State from stale claims from many, many years behind.

PRESIDENT GREENWOOD: Okay. Well, two questions about that. First: When did Mobil first incur loss or damage as a result of the 2004 Guidelines?

MR. O'GORMAN: For purpose of the continuing breach and the damages sought in this case, those were satisfied as within three years of when this claim were brought.

PRESIDENT GREENWOOD: That's an answer to a different question, Mr. O'Gorman. I didn't ask you about the limitation period. I just want to know when was the first loss or damage sustained? Is it the--I have forgotten the exact date of the Guidelines. Was it 5th of November 2004?

MR. O'GORMAN: That was the Measure. That was the Measure. But, for purposes of our interpretation of Article 1116(2), as I will go on to show, an appropriate interpretation is that the knowledge of breach and loss with respect to these claims was first acquired within the three years before the filing of this Notice of Arbitration.

PRESIDENT GREENWOOD: Again, I understand that that's your submission. I'm asking you about something different. I'm asking you more an historical point.

In the Mobil I Arbitration, Mobil made various comments about when the limitation period started to run, which are not quite on all fours with what you're saying now. That's understandable, Parties' change their position as litigation evolves.

MR. O'GORMAN: And as the Tribunal in the first case made its decision on what constitutes loss incurred.

PRESIDENT GREENWOOD: There is always a problem with litigation like this because there's a transcript of everything that you've said as well as detailed written pleadings. It's much more fun in ordinary court where you can't have that back against you unless somebody's got a very good memory.

But I'm asking you a different question: I'm asking you at what point in this whole saga, since November 2004, when was the moment when you first incurred any loss or damage?

I think Mr. Sikora may have the answer for you.

MR. O'GORMAN: Okay. The first dollar spent by Mobil as a result of the Guidelines, occurred in 2009 when the Guidelines were eventually--began to be enforced.

PRESIDENT GREENWOOD: Right.

MR. O'GORMAN: Those are--under our submission, those losses are different than the

losses being claimed here, but different time periods.

PRESIDENT GREENWOOD: Now, the second question I was going to ask you is, in its opening submissions, counsel for Canada made the point that certainly seems to me to be one that you are going to have to respond to, which is that there is a difference between knowledge that there has been a loss and knowledge of the exact quantum of the loss. Are you going to deal with that point?

MR. O'GORMAN: Yes, we will.

And to give you a preview of that, there is a very substantial difference to having incurred a one-off loss and not yet being able to quantify that loss, for instance, in the case of a one-off expropriation.

PRESIDENT GREENWOOD: Yes.

MR. O'GORMAN: You know there's been a loss, but you have to hire a damages expert to help you understand that loss. It's a very different situation where you don't know, on a day-to-day basis, if you will--if the breach will continue or if

you will incur any loss as a result of whether the breach continues.

PRESIDENT GREENWOOD: Okay. Thank you.

ARBITRATOR GRIFFITH: Mr. O'Gorman, your answer to the first question that the President asked, is there any reason why there wouldn't be a loss as soon as an obligation was incurred rather than when the payments made pursuant to the obligation?

MR. O'GORMAN: The Mobil I Tribunal spoke to that and came up with a very clear standard as to when loss is incurred. In that case, the Tribunal held that there was an obligation--an obligation for payment and a call for payment or an expenditure has been actually made.

ARBITRATOR GRIFFITH: Sounds like the answer might be that the obligation suffices, you don't actually have to pay the dollar, but I just want to understand your position is.

MR. O'GORMAN: The Mobil I Tribunal was very clear as to what constituted an obligation, and that was, as Canada argued, money actually spent out of

pocket or a very precise call for payment having been made, an obligation for payment.

Okay. Article 1116(2)'s knowledge requirement attaches to two elements, both knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. And of course, according to Meg Kinnear, obviously a preeminent expert on this subject, both of those elements must be satisfied. She provides: "The investor must acquire knowledge of both the breach and the ensuing damage. The three-year limitation period presumably runs from the later of these events to occur in the event that knowledge is not simultaneous."

As a necessary corollary, of course, if the investor does not have knowledge of both elements, then the limitations period is not triggered.

Now, the alleged breach must also have occurred. 1116(1) refers clearly to, which is the gateway to when a claim may be brought, requires that the other party, the NAFTA Party, has breached an obligation. Similarly, Subsection (2) refers to the alleged breach. A plain reading of this requires

that a breach that may or has not yet occurred does not trigger the limitations period.

The French and the Spanish texts, I am told, are entirely consistent on this subject; that the breach must be in the past.

Similarly, the loss or damage must have been incurred in the past. Article 1116(1) refers to "has incurred loss or damage." And, in fact, that is the argument that Canada made in the Mobil I Case. Similarly, the same language appears in 1116(2), that is, has incurred loss or damage.

PRESIDENT GREENWOOD: Mr. O'Gorman, again, this is really a question for both Parties, but I'm just trying to make sure that we understood the texts correctly.

My assumption is that the phrase "by reason of, or arising out of, that breach," which comes at the end of 1116(1), should also be read implicitly into the end of Article 1116(2), the loss or damage that is referred to in 1116(2) much be the type of loss or damage that is referred to 1116(1).

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: I don't know whether you want to say anything about that now, or whether you prefer to leave it for your submissions this afternoon.

MR. LUZ: We will defer until this afternoon, thank you.

PRESIDENT GREENWOOD: Thank you.

MR. O'GORMAN: So, as a corollary to these principles, the investor's knowledge of the loss or damage that has not yet incurred cannot trigger the limitations period. And once again, not being a French or Spanish speaker, I have been assured by my colleagues--and if the Tribunal has any questions about French or Spanish, we have the experts present--that these provisions are similar, that the loss or damage must have occurred.

So, with that overview of the text, let's turn, now, to the more specific concept of continuing breach.

The bottom line is that continuing breaches that are ongoing at the time of the Award in a case present a unique dilemma. In the context of a

continuing breach that is ongoing, the limitations provision should be interpreted so as to provide three objectives:

First, to encourage states to cease continuing breaches and comply with their international obligations;

Second, to protect the States against stale claims;

And, third, of course, to afford compensation to the investor.

This dilemma was, of course, very strongly in front of the Mobil I Tribunal. They provided in the Award: "The situation involves a continuing or ongoing breach as applied to these Claimants, and to the Majority's knowledge, has not been litigated before a NAFTA arbitral tribunal previously."

The Decision dealt with some of the peculiarities that arise from this with regard to future damages, but other difficulties resulting from this fluid situation remain to complicate the Majority's task: "This Tribunal has been asked in several instances to take into account events which

have not yet occurred, which, therefore, by nature require a degree of conjecture, as a future event can never be supported completely by evidence or information."

Now, you might recall in the opening, I referred to the Ripinsky and Williams article which itself was before the Mobil I Tribunal, and it results in a choice between two approaches to resolve the dilemma of the continuing breach, and they state that: "There is a choice between (1) compensating for future losses to be incurred as a result of the continuing breach or (2) awarding only past losses (up to the time of the Award) in the expectation," which is, of course, a requirement, "that the Respondent will cease its wrongful conduct. If the second course of action is chosen by the Tribunal, the Claimant should be entitled to subsequent compensation where the Respondent fails to cease the breach."

Approach Number 2, which is awarding past losses, the expectation of cessation and future actions as necessary is the vastly better approach.

In contrast, the first approach, which is award all future damages to be incurred, would encourage perpetuation, not cessation of the State's breach. Why is that?

PRESIDENT GREENWOOD: That's not quite the view you took in Mobil I, is it? Mobil I, you were urging them to adopt the other approach.

MR. O'GORMAN: We would have been glad to, but, of course, the Tribunal disagreed with us, we respect the Tribunal's decision on that and have modified and incorporated those binding decisions on us in what we argue to you, Mr. President.

PRESIDENT GREENWOOD: I understand that your hands are tied by Mobil I. I'm just interested to hear any counsel refer to a ruling against him on a point is by far away the better approach or the vastly better approach.

MR. O'GORMAN: As the Mobil I Tribunal has observed, this is certainly a unique situation where there is an ongoing breach for which relief was sought within three years of the breach and for which the breach has continued unabated since that time.

It's certainly a unique situation.

But an award for future damages that punishes the State will encourage the State. There is no reason for the State to discontinue the breach. In effect, the State will have paid the award and will have lost interest in the case. That, of course, would result in very skewed incentives the wrong way. States should be encouraged to cease their activity and, of course, should only be required to pay the damages that the investor has actually incurred before the cessation of the breach, not an estimate of damages that it might incur for the remainder of the breach.

ARBITRATOR GRIFFITH: Mr. O'Gorman, do you say "there is no reason or there is no reason of compulsion for a State not to continue the breach," I mean, there might be reasons, such as arising from obligations under ordinary principles of public international law arising from treaty obligations, but it may be another thing to say there is a compelling or compulsory reason. I think you're probably referring to "reason" in the former

sense--no, in the latter sense. When you said there is no reason?

MR. O'GORMAN: That's correct. That's correct.

The compulsion I will get to in the alternative case, of course, is the duty to cease.

ARBITRATOR ROWLEY: Can I have just a little go at something, put the proposition to you. You can comment on it, and Canada can think about it.

It strikes me you have four possible situations:

One is a breach of the NAFTA which gives rise to loss which is known or knowable at the time.

The second is a breach where the breach is not knowable immediately because of the particular facts of the situation such as--and I will give you an example in a moment, but if you have a requirement to pay a certain amount over time on the happening of certain events, until those events happen, you don't know what you have to pay and, therefore, the loss is not known until that time. So, this is the one breach situation with two examples.

Then you have the continuing breach situation where the breach starts; some loss is known at the beginning, and some loss is not knowable until events happen in the future. I think you're arguing for that, Mr. O'Gorman.

And then there is the fourth situation; we have new breach here--and you're going to come to the alternate case--that, even if there was a breach in 2004 and even if one ought to have known or could know the loss up until the Tribunal ruled, if there was a new breach, that, then, starts things running again.

And I'm minded to give you an example of--and just before I get there, it seems to me that what we've got to come to grips with is the meaning of loss, knowledge of loss or damage because, if you require both, then if you can't know of the loss or damage until a particular event occurs, then the limitation period doesn't run until that happens. So, that gives you the four examples.

The example that we have discussed briefly internally is think of a person who owns a race

horse. If somebody expropriates his race horse, one has knowledge immediately of a breach if the expropriation is unlawful and has to value the race horse. If, however, a government comes along and says, "Mr. Rowley, we're not going to expropriate your race horse, but you're going to have to pay us a percentage of your winnings over time," and that is an unlawful act or measure, nobody will know what my loss is until I race the horse from time to time. And if I don't race the horse for a couple of years and race it in a couple of years and win, then I know I lose something in that time. I wonder whether that's a useful analogy for us to think about.

I leave those thoughts with you.

MR. O'GORMAN: That's an extremely helpful analysis, Mr. Rowley, and we have the race horse situation here where, even though we know the race horse pretty well, the criteria by which the future payments would be made are wholly outside of Mobil's control and very difficult to determine on a going-forward basis: Number one, if those requirements, which had been found in violation of

NAFTA, will, in fact, continue; and, two, how those could be calculated over the future life of field given variables, for instance, solely within the control of Canada such as the Statistics Canada factor.

In effect, the challenge of making a future loss claim is baked into the Guidelines and then promulgated by the Board. And the irony, of course, is that Canada is then arguing that the uncertainty created over the long-term application of those Guidelines is something that the investor should be punished for. But thank you very much for these possibilities, and we will include the discussion of these as we go forward.

In some respect, responding to Dr. Griffith's comment about the various obligations a State may be facing, of course, and why the future damages approach is not the right approach, first, it does not take into account that future damages and future breaches are unknown and unknowable, but the State, which is a good thing, could choose to cease the breach at any time. And, of course, it could be

driven just simply by the rule of law; that is, the State recognizes its international obligation that has been found against it and ceases the breach or, of course, by the political mechanisms; a new government could come in and decide to stop, for policy considerations or otherwise, to stop enforcing the continuing breach.

Moreover, the concept of awarding future damages all at once cannot account for losses whose dimensions change over time. And then this is, of course, related, in fact, to the race-horse analogy of the winnings, which is unknowable. As the UPS Tribunal aptly noted: "A continuing course of conduct might generate losses of a different dimension at different times."

In this case, by way of example--certainly not the only example in the formula prepared by the Guidelines-- the Statistics Canada benchmark selected by the Board to drive the Guideline expenditure requirements changes year by year. In 2002, the benchmark was .2 percent, for instance. By 2013, it had changed to .9 percent. While it is a steady

progression, it is not linear and changes by the year. Of course you can see--

PRESIDENT GREENWOOD: Mr. O'Gorman, isn't that an example where you know that you had incurred loss but you wouldn't know the quantum of that loss?

MR. O'GORMAN: No. The answer is no because, once again, you do not know that you will incur loss, and any individual losses, for continuing breach until that loss--until the breach continues and that loss is actually incurred.

PRESIDENT GREENWOOD: The StatsCanada benchmark is known--if I've understood this right, the StatsCanada benchmark for, let's say, 2017 is known before 2017 again; is that right?

MR. O'GORMAN: I don't believe that's the case.

PRESIDENT GREENWOOD: Ah, but that does make a difference.

If you go into 2017 and you know you are going to be required to spend a certain amount of money--but you don't know how much money--and there are various other imponderables such as what will be

allowed at the squaring up at the end of the year--but, nevertheless, you would know, let's say, at close of play in 2017 that you had sustained loss and damage--you might not be able to quantify that until later. It's rather like Mr. Rowley's race horse in the first example: You don't know how valuable what you've lost is until the final squaring-up process is finished.

So, at what point does the limitation period start to run?

MR. O'GORMAN: The limitations under the continuing breach theory does not start to run until the breach is completed. But--but--and here is a very important "but"--recovery is limited to the temporal time period from within three years before the notice of arbitration is filed.

Now, by way of further answer to your question, just one factual comment. The OA squaring-up period only occurs once every three years. It's not done on an annual basis, and that the--during the OA Period, the annual obligation is given by way of informational purposes only to the

investor retrospectively. In other words, in the first few months of each year, the Board will say, "As of last year, you should have spent this much," but finally it's not actually trued up and analyzed until the end of the OA Period.

So, it's very much--it's a very much moving and fluid, as the Mobil I Tribunal said, a fluid target.

The other imponderable in the situation is that the expenditure requirement takes into account normal "ordinary course" spending, which, itself, is very difficult to predict. In other words, the overall spending requirement is X. From that is removed the R&D that the project would spend in the ordinary course, and that expenditure requirement is also very difficult to predict and to know.

In the present case, for instance, factually, we've talked about the so-called "H2S mitigation study" in the Terra Nova Project, which no one could have predicted or saw coming and which was very substantial.

PRESIDENT GREENWOOD: Now, of course, every

sensible lawyer tries to play it safe. So, you're probably going to say, while the law might not require this, you would, nevertheless, advise your clients to get in early. But let's take a calendar year, and let's make it 2014.

You start writing checks from January 2014 for various projects, but you don't know when you write those checks what the full extent of the StatsCanada benchmark will be, how various projects will be built with, what your "ordinary course" expenditure is going to be. That might not be known to you until, let us say, sometime well into 2015.

Does the limitation period, based on knowledge of loss being incurred, start to run when you write the check in January 2014 or not until some later point in time?

MR. O'GORMAN: As I mentioned, it's a two-part test. You need to have knowledge of the breach and knowledge of the actual loss before the limitations period is triggered.

PRESIDENT GREENWOOD: It's just knowledge of the loss I'm asking about because that will almost

invariably come--if there is a difference between the date, the date of knowledge of the loss is always going to be later than the date of knowledge of the breach, isn't it?

MR. O'GORMAN: Yes, that's logical.

PRESIDENT GREENWOOD: So, when--therefore, the time limit will start to run from the later of those two dates--that's on occasion when they're not one and the same--there will be many breaches where they will be one and the same.

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: Now, when do you acquire the relevant knowledge of loss for the purpose of claiming for those January 2014 checks? When you write the check or not until some later date when you actually know that its Incremental Expenditure and whether it's going to be allowed, et cetera?

MR. O'GORMAN: Yes. A factual comment on the present case. The so-called "check" is written by HMDC, the Operator. It's not written by Mobil, and so Mobil receives an annual reconciliation of the

expenditures made being required by the Guidelines; but while the check is written, for instance, in January--I think of your scenario of January 2014-- Mobil does not necessarily have notice of that check until the annual reconciliation period within the Operator at year-end.

PRESIDENT GREENWOOD: So, are you saying, then, for purposes of a claim by Mobil Investments Canada, the limitation period starts to run maybe a year later from the moment when the ExxonMobil receives its invoice or whatever from HMDC?

I'm going to have some difficulty with that proposition, I have to tell you, because that sounds to me as though the more complicated you make the accounting chain on the investor's side, the longer you can push the limitation period into the future.

MR. O'GORMAN: There is no doubt, when you look at the cases, tribunals are and should be very skeptical of arguments made by investors that try to artificially extend or tack on time periods to make a claim timely that's not really timely. That's certainly not the situation we have here.

And the most conservative approach, which is met in the present case, is that, when--if, for instance, the check written by HMDC were to trigger the limitations period based on the loss, the claims brought in this case are still brought within three years of that loss incurred, and so I think that's a decision you don't need to reach in this present case.

PRESIDENT GREENWOOD: Well, it may be a decision we don't need to reach in the present case, but it's, nevertheless, useful for trying to sort out what the meaning of these terms in 1116 is.

As I indicated on the day of Opening Submissions, I don't think this is a straightforward matter. This isn't one of these propositions, but you wouldn't all be here litigating if it were a straightforward matter, let's face it.

Many of the people who work for HMDC--I use "ExxonMobil" to refer to the entire Mobil group for these purposes. They are from the Mobil group; yes?

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: Are their salaries paid

by Mobil and then charged to HMDC, or are they technically employed by HMDC and their salaries paid as HMDC costs?

MR. O'GORMAN: I think I know the answer, but let me ask the Expert.

PRESIDENT GREENWOOD: Yeah.

MR. O'GORMAN: If Mr. Phelan may answer that.

PRESIDENT GREENWOOD: Of course. Of course.

MR. PHELAN: So, there is a secondment agreement. The employer would be ExxonMobil. So, the employer pays the ExxonMobil employee in January, for example, of 2014, and then ExxonMobil bills HMDC. That bill is typically paid within 30 days.

So, HMDC would then incur that cost for that ExxonMobil employee.

PRESIDENT GREENWOOD: Yes, that's what I would have expected because, otherwise, it has all kinds of difficult pension implications for the staff members concerned.

MR. PHELAN: That is correct.

PRESIDENT GREENWOOD: But, surely, in those circumstances, take somebody like Mr. Sampath, an

ExxonMobil employee who was running research for HMDC, mainly to try and the spend the money that you claim you are now being required to spend, I think if he's deciding to incur what he regards as Incremental Expenditure in January 2014 on one of these research projects, I think it would surely be the case that, if ExxonMobil didn't have knowledge--and I think you probably do because his knowledge would be treated as yours. But, even if that wasn't the case, isn't this one where you also have acquired that knowledge at the time the checks are written by HMDC? After all, it's done by your own employees.

MR. O'GORMAN: Mr. President, just to be clear, we're willing to accept the date of knowledge as January 2014. But I don't think it is necessarily true that Mobil should be deemed to have knowledge as of that date; but, for purposes of your decision, we are certainly okay with you concluding that knowledge is triggered when HMDC makes the spend, even though ExxonMobil and certainly Mobil, the Claimant in this case, is not HMDC.

PRESIDENT GREENWOOD: So, if we reject your

argument about HMDC and Mobil being different for these purposes in another arbitration proceeding, you will tell the tribunal that our approach was vastly better than the one put to us?

MR. O'GORMAN: We will certainly respect your decision.

PRESIDENT GREENWOOD: All right. Thank you very much.

MR. O'GORMAN: My colleague told me something very factually pertinent.

Of course, this discussion that we were just having was with respect to expenditures by HMDC. With respect to expenditures by Suncor for the Terra Nova Project, the knowledge is a vastly different situation, and there are no ExxonMobil employees seconded, for instance, to Terra Nova.

To finish up this slide, the point is that the dimension of losses change at different times over the lives of the investment, as exemplified by the StatsCanada factor but certainly not limited to it.

So, back to the approach of awarding all

future damages in the first case. At the bottom line, it's unfair to the investor, it's unfair to the State. What it is the unfairness to the State? Well, it can, of course, result in a windfall to the investor. If the investor somehow is able to prove all future damages and those damages are awarded and the State ceases, the investor has not actually incurred those damages. That would be fundamentally unfair to the State. It would also encourage the State not to cease the breach.

It would also be unfair to the investor because it would limit reparation to the investor of a continuing--subject to a continuing breach only to those damages which it could actually establish in that first case, and we've seen the difficulties that an investor faces when quantifying losses caused by a complex formula of losses calculated in the future in many aspects retrospectively by the State itself or--excuse me, by the State's entity.

So, Canada, in this case, would have you believe that the first approach is the way to go. Canada's position in Mobil I that the damages must

have been incurred does comport with Article 1116(1), and yet they specifically objected to compensating for future damages as they said "not yet incurred," and the Tribunal accepted Canada's position on that issue.

Given that the breach has continued, I think we can assume that, contrary to its position in Mobil I, the approach--that approach one was viable all along for Mobil, we can certainly see that that approach by Canada is motivated by the fact that it now does not face a future life-of-field damages claim. Canada's endorsement of the first approach would subvert the intention of the NAFTA Parties that a claim may be brought only after the investor has incurred loss or damage.

So, the proper application, I hope, I submit, of Article 1116(2) in the case of a continuing breach has been established. The tribunals in Mobil I, UPS, and Judge Simma, as the Chairman of Rusoro, were confronted with the same dilemma that now confronts this Tribunal. They were also presented by the State in those cases with the same reading of, first, in

1116(2) that Canada now advances.

How did they come out? They rejected a mechanical application of 1116(2) in favor of a reasoned approach that was calibrated to the context of the continuing breach that produces ongoing losses of different dimensions over time and for which breach could cease at any time.

These tribunals were aware of the considerations that, for all future claims, and in light of this, crafted a rule with respect to limitations that comported with the language, object, and purpose of the NAFTA. This rule fully protects the interests of the State from both truly stale claims, thereby ensuring that the object of the limitations provision is met, and protects them from the risk and unfairness of overcompensation for the investor's losses that are not yet incurred in the first case and may never be incurred. This approach also protects the interests of the investors in receiving full reparation for the losses they have actually incurred by reason of or arising out of the State's breach.

Mr. President, we submit that these cases--Mobil I, UPS, and Rusoro--were correctly reasoned and decided on the limitations issues.

Now, the concept of continuing breach is not a stranger to international law.

Mr. President, I hope to read the quote correctly this time, as you pointed out the first time: "Article 14 of the Articles of State Responsibility provides for extensions in time of the breach of an international obligation. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the Act continues and remains not in conformity with the international obligation."

As held in Mobil I, the enforcement of the Guidelines is a continuing breach. From the decision--we've read that many times. I don't need to read it to you again.

It's also picked up again in the Award of Mobil I. The situation involves a continuing or ongoing breach as applied to these Claimants.

Now, Mobil I's determination of continuing

breach is binding between Canada and Mobil, as it was distinctly put at issue. The Claimants--the Mobil I Tribunal describing the breach as a continuing treaty violation. It was actually decided by the Mobil I Tribunal in its Decision, the Majority, from the quotations--you can glean that from the previous slide--and was necessary to the Tribunal's Decision to leave questions of later damages for new NAFTA proceedings. And you can see the logic and the connection when they say: "Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings."

Now, I might add that the Mobil I Tribunal also had the UPS Case in front of it and cited that case in the Decision.

PRESIDENT GREENWOOD: I want to just stop you for a moment and look at that quotation from Paragraph 478, which is the quotation you have just given us about the Claimants can claim compensation in new NAFTA arbitration proceedings. Obviously, that's an important passage in the Mobil I Decision.

What is its legal status, in your submission, as far as we're concerned?

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: Are we bound by the view taken by the Mobil I Tribunal on this point, or do we need to decide for ourselves the question of the application of 1116(2) and 1117(2)?

Take your time and consult because it's an important point.

(Pause.)

ARBITRATOR GRIFFITH: Before you answer, I was just thinking whether or not that proposition that you're making is not sliding into res judicata to say that it is decided between us; therefore, it's decided, it's not for this Tribunal to have its own views. Is there a bit of an overlap there?

MR. O'GORMAN: Yes, there is an overlap, and so this preclusion is based on the concept of issue preclusion which, to your previous question, Mr. President, does exist in international arbitration and is exemplified in the Grynberg Decision.

But to your question, Mr. President, what is the impact of this? And given what was before the Mobil I Tribunal, this Decision, this statement is binding on Canada that it should not be able to raise a limitations defense by mere fact of the passage of time unless it is able to show, for instance, that the investor sat on its hands and did not diligently pursue claims with respect to the ongoing implementations of the Guidelines.

Now, ultimately, I think probably your next question, Mr. President, is you, of course, need to determine your own jurisdiction, but our submission is that Canada is estopped from contesting limitations in this case by virtue of this provision since Mobil has been extremely diligent in pursuing these claims and brought the present case during the pendency of the first case.

PRESIDENT GREENWOOD: Let's leave aside for the moment any question about Mobil being diligent, because I don't think it's suggested that you weren't on this point.

So, what you seem to be telling us is this:

We have to decide the issue of jurisdiction for ourselves. It cannot be delegated or we can't sort of just follow what Mobil I said. But, on the other hand, what Mobil I said is binding on Canada, and Canada is, therefore, estopped from arguing that you're outside the time limit under 1116(2).

Now, that puts us in this rather odd position. Canada has argued that. We've heard Canada arguing that, and I suspect we're going to hear Canada arguing something like that again this afternoon.

So, what you seem to be telling us is we can decide it for ourselves, but we mustn't pay any attention to the way Canada has told us we can decide it for ourselves; is that right?

MR. O'GORMAN: That's right. Canada is effectively estopped from contesting the limitations issue in this case. You, as the Tribunal, ultimately decide for whatever reason whether the requirements of NAFTA are satisfied in order to allow us to prevail in this case. But, in taking stock of that, I think you need to take into account that Canada is,

in fact, precluded from arguing limitations based on the Decision in Mobil I.

PRESIDENT GREENWOOD: So, if it's something we come up with for ourselves, it's all right, but if it's their argument, it isn't.

MR. O'GORMAN: I think at the end of the day you need to become--it is your decision whether Article 1116(2) has been satisfied.

PRESIDENT GREENWOOD: It's quite an important point about the limits of res judicata, not in connection with the separate res judicata point, and that's a different issue altogether. But if this passage in Paragraph 478 creates a res judicata, then we don't have to enter into the issue of jurisdiction. Whatever the Treaty says on that analysis, as between Canada and Mobil, there is a binding ruling, and, therefore, we have jurisdiction.

I tell you straightaway that I would be extremely dubious of that proposition, but that seems to me to be one way of putting it.

Another way of putting it is to say "very interesting what they said. It may be very

interesting in relation to understanding the main res judicata argument we will come to in a little while, but it doesn't alter the position that we have to determine jurisdiction for ourselves."

What you're saying appears to be somewhere in between the two, stranded in Mid-Atlantic, as it were.

MR. O'GORMAN: The Mid-Atlantic, yes.

Our position is more like akin to Article 1--Position 1, noting, just to be--to relay our position, is that limitations are not a jurisdictional issue. Limitations are a matter of admissibility as made clear by the Pope & Talbot Decision, the only NAFTA Decision to have passed on this express issue.

PRESIDENT GREENWOOD: There are certain problems with Pope & Talbot, aren't there? But what's the difference of practical purposes between jurisdiction and admissibility in relation to this issue in this case? You've made your point in the opening submissions about burden of proof, but does that really make any difference, because there is no

evidence on this issue? It's not a matter of proof. It's a matter of whether we're more persuaded by you or by Canada.

MR. O'GORMAN: If I may have a second.

PRESIDENT GREENWOOD: Of course.

(Pause.)

MR. O'GORMAN: After receiving my colleagues' good counsel, they have told me to tell you--

(Laughter.)

ARBITRATOR GRIFFITH: Usually that's a very bad reason to make this submission.

(Laughter.)

MR. O'GORMAN: To the extent that you find that limitations are a matter of admissibility, that is something that you would not normally be reviewing on your own and determine your own jurisdiction. In other words, if the finding of limitations--excuse me, if the determination of limitations is a matter purely of admissibility, then the estoppel by Canada to argue otherwise would then effectively be binding on you as the Tribunal. If, on the other hand, it is purely a jurisdictional issue, then that gives, I

think, you more latitude. Even though Canada is estopped from arguing that position, it does provide more latitude for the Tribunal to come to its own conclusions based on everything before it, including the fact that Canada cannot properly be arguing limitations. But, ultimately, as a jurisdictional matter, that puts it more in your wheelhouse.

PRESIDENT GREENWOOD: Well, that's one of the best arguments I ever heard, if I may say, about the distinction between jurisdiction and admissibility, which has always puzzled me. But let's see if I understood it right.

You're saying that if the limitation under 1116(2) is jurisdictional, then we have to decide it for ourselves; that we should ignore what Canada is saying. And if it is a matter of admissibility, then the matter has already been determined.

In other words, the Mobil I Tribunal cannot confer on us a jurisdiction which we would not otherwise possess, but it can render admissible a claim that would not otherwise be admissible.

MR. O'GORMAN: Yes.

PRESIDENT GREENWOOD: Is that the essence of your submission?

MR. O'GORMAN: You said it much better than I did, Mr. President.

PRESIDENT GREENWOOD: I don't know about that, but thank you. That's very helpful.

The precise boundary between jurisdiction and admissibility is something that constantly troubles us in the International Court of Justice. I'm going to go away and think about that one, not just in the connection with this case, but in connection with wider points.

All right. Yes, let's get on.

MR. O'GORMAN: Thank you.

So we've just been discussing res judicata effect of the Mobil I finding. But, independent of that effect, of course, I think there is no doubt--although Canada was not willing to concede the fact--that there is, in fact, an ongoing breach occurring to this day.

The ILC Commentary on State Responsibilities, of course, points out the notion of what is an

example of an ongoing breach. And the lead example, of course, includes the maintenance, in effect, of legislative provisions; and that is on all fours with exactly what is occurring by the imposition of the Guidelines to the offshore Newfoundland and Labrador petroleum area.

In a continuing-breach case, the investor will incur the loss or damage not all at once but, rather, over time. Let's see what some of these tribunals have said.

The UPS Tribunal: "A continuing course of conduct might generate losses of a different dimension at different times."

LG&E, which also faced a continuing breach: "This breach makes Argentina liable for the payment of compensation as long as Argentina fails to restore the gas tariff regime."

And of course, the Ripinsky and Williams article--this is a citation for a slightly different proposition: "Where Claimant's losses unfold over time (such cases involve impairment to, rather than destruction of, an investment)" or a 'race horse,'

these are “cases involving a continuing breach by the respondent.”

As held in Mobil I, Mobil's losses are incurred not all at once but, rather, over time. As the Mobil I Decision stated: "In the present case, the investment is not destroyed but encumbered, and the Respondent's breach gives rise to continuing losses whereby the losses unfold over time. The breach continues and results in the incurring of losses which crystallize and must be paid sometime in the future."

Of course, that conclusion of the Mobil I case of ongoing losses is easily confirmed: If Canada ceased the ongoing enforcement of the Guidelines, then Mobil's obligation to pay Incremental Expenditures would cease as well.

The UPS Tribunal says: "The limitations period does have a particular application to a continuing course of conduct. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can only be based on

losses incurred within three years of the date when the claim was filed."

Rusoro takes the same approach--a similar approach: "The continuing character of the acts and the composite nature of the breach may justify the totality of acts be considered as a unity not affected by the time bar."

As I discussed in the textual section we've discussed previously, the alleged breach element of Article 1116(2) must be in the past. By definition, a continuing breach is still ongoing and not complete, as the UN Articles on State Responsibility note. Thus, the investor cannot be considered to have first acquired knowledge of a breach that is still ongoing because the breach is not completed.

This is consistent with the Report of the ILC: "The determination of the final moment of the commission of an internationally wrongful act may be decisive for the determination of the moment from which the period of extinctive prescription begins to run. In the case of a continuing act, wrongful act, however, this dies can be established only after the

end of time of the commission of the wrongful act itself." And that tracks--

PRESIDENT GREENWOOD: Can we just go back to your Slide 42 for a moment, please. It's the passage in bold at the bottom, which is you rather than the ILC, is it not?

MR. O'GORMAN: Yes, it is me, Mr. President.

PRESIDENT GREENWOOD: Right.

MR. O'GORMAN: Sorry for any misunderstanding.

PRESIDENT GREENWOOD: That can't be right, can it? If you have a continuing breach, of course you can first acquire knowledge of it at some particular point in time.

The logic of that last sentence is that, if that's right, then you can't have knowledge of a continuing breach at all. So, if you can have knowledge of something, there is a moment at which you first acquire that knowledge.

MR. O'GORMAN: That knowledge for purposes--certainly--I see the question--that knowledge for purpose of this requirement changes on

a day-to-day basis, and you can only know of a completed breach when that breach has been completed of a continuing breach.

ARBITRATOR GRIFFITH: You have each morning, and you start the day saying, "I have knowledge of today's breach."

MR. O'GORMAN: Well, it's very optimistic, but every day, I'm sure Mobil wakes up and says, "I really hope they will stop enforcing the Guidelines today."

PRESIDENT GREENWOOD: Well, I should be fascinated to know whether you could produce a witness statement from the President of Mobil saying that the first thing I think about on waking every morning is whether they are going to stop enforcing the 2004 Guidelines for Newfoundland and Labrador.

ARBITRATOR GRIFFITH: The expression is "Make my day."

MR. O'GORMAN: And, certainly, if they did, I'm sure it would come to his attention.

PRESIDENT GREENWOOD: Sorry, can I just go back to that. There's a big distinction between the

way Dr. Griffith just interpreted that provision, and the way I think you're putting it.

The way Dr. Griffith interpreted it in his question, or what's implicit in his question--if he'll forgive me for saying so--is each morning you wake up and you first acquire knowledge that morning of that morning's part of a continuing breach.

And if you read it that way, then if you have a continuing breach that extends over, let us say, 10 years, then each morning 1116(2) limitation period runs afresh in relation to that day's loss. If you claim at the end of the 10-year period of the continuing breach, you can only recover for the damages sustained in the last three years of that breach.

If you take your statement literally, especially in the light of the answer you've just given me, you don't acquire knowledge of a continuing breach until that breach is completed, which means that at the end of the 10-year period of the continuing breach, you then have three years in which to bring your claim; and, provided you bring your

claim within that three years, you can claim for the losses sustained over the whole of the 10-year period. Which is it?

MR. O'GORMAN: This interpretation contained on the bottom of Slide 42 is bounded by the notion that only losses incurred within the last--within three years before the filing of the arbitration--can be recoverable.

And so, no, we're not advocating a position that an investor should be able to sleep on its rights and retroactively, many years later, make a claim under NAFTA.

PRESIDENT GREENWOOD: Now, I can see that. But then I--we have to decide this case; but, in order to do so, we have to get a proper understanding of each party's views of what 1116 actually means.

And I think there is a world of difference between the proposition that, with a continuing breach, you wait until the breach has been completed; and the proposition that with a continuing breach, knowledge of the breach--the breach, as it were, renews each morning, and knowledge of the breach also

renews each morning.

It must trouble the president of Mobil terribly over his morning croissant.

MR. O'GORMAN: Yes.

If I may consult with my colleagues for a moment, Mr. President.

(Pause.)

MR. O'GORMAN: Two very important clarifications, Mr. President.

The president of ExxonMobil is a "she", and so--it's a woman. And so, I'm very embarrassed about that, that I got that wrong.

PRESIDENT GREENWOOD: Deeply embarrassed at the way I framed my comment. It must give the President of Mobil much trouble over her morning croissant and coffee. Please, let the record be corrected to that effect.

MR. O'GORMAN: My apologies for that.

The way that the UPS Tribunal approached your question, about the question of "is it renewed every day?", their conclusion was that it was renewed every day--but then bounded by the three-year period. And

I think that's an appropriate interpretation of that.

PRESIDENT GREENWOOD: So, you're resiling from your comment at the bottom of Slide 42, are you?

MR. O'GORMAN: We think the UPS Tribunal's approach is the approach.

PRESIDENT GREENWOOD: Thank you.

MR. O'GORMAN: That is slightly different than the bottom of 42.

PRESIDENT GREENWOOD: Thank you.

And now Mr. Rowley has very patiently waited to ask his question while I explored mine.

ARBITRATOR ROWLEY: Luckily, this is a situation by waiting, the problems have been resolved.

MR. O'GORMAN: Thank you, Mr. Rowley.

Okay. So, the UPS Tribunal--I think we talked about the ILC Commission Report, that the limitations period can be established only after the end of the time of the commission of the wrongful act, the ongoing wrongful act.

UPS picks up a similar idea, that: "The generally applicable ground for our decision is that

continuing courses of conduct constitute continuing breaches of legal obligations, and renew the limitation period accordingly."

As we discussed in the interpretation of the text, the term "loss or damage" element must have occurred. Thus, the investor cannot have "first acquired knowledge" of the loss or damage that has not yet been incurred.

Excuse me, Mr. President, if I may have a moment.

(Pause.)

MR. O'GORMAN: This principle goes to your earlier question, Mr. President, that if Mobil was required to spend $1 eventually--excuse me, originally, that does not preclude a claim for the money expended, for instance, in 2045, because those claims and those damages are not quantifiable. They just simply have not occurred. When I say "not quantifiable," I mean it's not that they are difficult to quantify, it's that they simply have not been incurred, and there is no indication that they will be incurred.

In Mobil I, the principle that "estimated future losses caused by one-off breaches are compensable" does not apply here, because, in the present case, the breach--that is, the application and enforcement of the 2004 Guidelines--

ARBITRATOR ROWLEY: I'm just going to interrupt you for a minute. "Not incurred" and "no indication that they will be incurred," I think it's probably better, it's "not incurred" and "no certainty that they will be incurred."

I say that because there is an indication they will be incurred because the legislation's in place. But your argument is you don't know whether it will be continuing to be enforced, or whether some--a new government would change it, or at the time of Mobil I, the proper expectation was that it would be revoked.

MR. O'GORMAN: I think, in response to your question, Mr. Rowley, the fact that Mobil was required at some point to spend a dollar in the past does not indicate, or does not preclude a claim in the future, that money will actually be required to

be spent or to be incurred. It's just unknowable to the investor whether those demands will continue, whether the breach will continue, and whether the losses will continue.

So, the Mobil I Tribunal, talking about estimated future losses caused by one-off breaches, this, of course, is the opposite of a one-off breach; that is, the application and enforcement of the Guidelines gives rise to continuing losses which are typically not known until well after the relevant year has passed.

The loss or damage element of 1116(2) is not satisfied in the present case; therefore, the limitations period had not expired by the time the Request for Arbitration was filed in the present case on January 16, 2015.

Mobil first acquired knowledge of having incurred the loss claimed in this proceeding no earlier than January 16, 2012, which is three years before the claim was filed.

Moreover, the alleged breach element is not satisfied. Because the enforcement of the Guidelines

is ongoing, Mobil has not yet acquired knowledge of Canada's breach, which must be completed and in the past.

In conclusion, the proper construction in the context of continuing breach, this Tribunal should construe Article 1116(2) to allow investors subject to continuing breach to claim losses as they are actually incurred. In this proceeding, Mobil is seeking losses that it incurred within three years of the submission of its claim. Therefore, under the correct application of 1116(2), its claim should be considered to be timely.

Now, let's shift gears for a second and talk about an argument that Canada has made over the course--

PRESIDENT GREENWOOD: Mr. O'Gorman, you've used the fatal word "conclusion," which, roughly halfway through the morning, always translates as "coffee". Would this be a convenient moment to stop for coffee?

MR. O'GORMAN: Yes, Mr. President.

PRESIDENT GREENWOOD: I think you might

actually want to actually take a hot drink yourself if your throat is giving you trouble.

MR. O'GORMAN: Oh, yes--thank you.

PRESIDENT GREENWOOD: Thank you.

It's 20 past. We will resume at 25 minutes to 11:00, after a brief coffee break. Thank you.

(Brief recess.)

PRESIDENT GREENWOOD: Yes, Mr. O'Gorman.

Mr. O'Gorman, I realized when I was teasing you about your comment about the Mobil I Decision being vastly better than the submissions your clients have put to it, I'd forgotten, of course, that it was a different set team of lawyers putting those submissions, so distancing yourself from your predecessor's position is always much easier to do.

MR. O'GORMAN: Thank you, Mr. President.

If I could just pick up on one point that we were discussing a little bit before the break, and it seems as though Canada is making an argument that the knowledge of the first dollar incurred as a result of the Guidelines somehow triggers the limitations period on all of the dollars that may ever be spent

for the Project or incurred in the future, and those claims would be barred because of it. That concept and that proposition cannot be correct because it would create a disunity between Article 1116(2) and Article 1116(1) which refers to losses incurred. It also creates a disunity with the Mobil I Decision that says a claim cannot yet be made for losses that have not been incurred.

In other words, the result of the first-dollar-spent argument would put Mobil in a position that while it can't make a claim for future damages not yet incurred pursuant to Mobil I, it is nevertheless barred by limitations for those losses that it will spend in the future but have not been spent yet, and so that would create the disunity between those provisions and should not be accepted for that reason.

Turning, now, to Canada's valuation fallacy, we call it, so Canada argues that Mobil could have recovered life-of-field damages in Mobil I, if it had only provided some corroborating valuations.

So, Canada argues that it is fair and just to

dismiss the claims in this case based on limitations, because Mobil, according to Canada, could have recovered life-of-field damages in the Mobil I case, if it had only used a better valuation model. In Canada's words, Mobil chose not to value their damages in this way, and therefore this Tribunal should not feel sorry for Mobil-- that the outcome of the denial of future damages was somehow Mobil's fault.

Canada's position today that the current claims are barred by limitations because the losses were incurred--that's a shift in their position--we have been talking about that--and provable upon the Guidelines' implementation in 2004. Canada says the losses were incurred if measured as a diminution in Investment Value and provable if alternative measures of damages, such as transactions, impairment analyses or internal valuations were considered. Now, I should add before I go on that if you read the Mobil Decision, when it talks about losses incurred and Canada's argument at that point, it specifically said that Canada was arguing literally out-of-pocket

damages actually incurred actual losses, not some kind of valuation model.

But, in any event, even if that were possible, Mobil never incurred investment losses as it never sold its interests in Hibernia or Terra Nova. Because that has never happened, the life-of-field impact has never been incurred.

As Mr. Phelan testifies, there were no sales of interests in the affected Projects, no impairment analyses were done, and no internal valuations were performed. Thus, there was, and still is, no additional data to bolster the life-of-field claim that was made in Mobil I with what Mr. Walck calls a "sanity check."

But there is a more fundamental problem with Canada's argument: Canada asks you to believe the fallacy that measuring the uncertain and unmeasurable can be accomplished if only done at a greater level of abstraction. This is by no means as elegant as Mr. Rowley's racehorse analogy, but I will give it a try.

It's the example of a leaky pipe in an oil

refinery. A pipe is leaking and causes loss to the refinery Owner, according to Canada, if the future impact on cash flows from a leaking pipe is uncertain, it nevertheless somehow becomes quantifiable by valuing the refinery before the leak and after the leak is discovered by sales or other data out there. This just cannot be true. The value of the leak or the cost of the leak, if uncertain to the Owner, is even more uncertain to any buyer, and lost in the much greater uncertainties of the valuation of the future financial performance of the entire refinery. At best, you would be valuing the loss due to the leaky pipe--at best--in and of itself. Canada is attempting to sell this argument to distract you from the fundamental reversal of its position and to make you feel better about dismissing this case, either based on limitations or res judicata. We submit that you should not take that on board.

Let me move, now, to the alternative-limitations case.

If you were to find that a continuing breach

extends the limitations period, this argument applies. So, Canada has decided to enforce the Guidelines in the face of the Mobil I Decision and fails to cease its wrongful act. The duty to cease a continuing wrongful act is not a big surprise. The Articles of State Responsibility provides at Article 30, cessation and non-repetition. The State responsible for the internationally wrongful act is under an obligation to cease that act, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if the circumstances so require.

And just to pick up on a comment by Mr. Rowley, it's interesting to look at Article 1106, which, of course, is the basis for the claim in this case on Performance Requirements which provides expressly “no party may impose or enforce” improper performance requirements.

A States perpetuation of its continuing breach, after a decision by a competent Tribunal that its conduct is illegal, breaches the duty to cease. In the ICJ case of Haya de la Torre, the ICJ held in

the first proceeding that Colombia's grant of asylum to a Peruvian national was not in accordance with the Havana Convention on asylum. Subsequently, Colombia failed to terminate the asylum, and Peru commenced a new proceeding.

In the second proceeding, the ICJ held that the asylum granted, and maintained since that time, ought to have ceased after the delivery of the judgment in the first proceeding and should terminate.

Similarly, another international tribunal based in The Hague, the Iran-U.S. Claims Tribunal, dealt with a very similar situation. In the original proceeding, the Tribunal held that Iran had been in noncompliance with its obligation to replenish the designated account that secures payment of claims against Iran.

MR. LUZ: Excuse me, I don't mean to interrupt, but I don't believe the past two authorities that the Claimant is pointing to have--are on the record or have been submitted as authorities so.

MR. O'GORMAN: Yes, they aren't, nor is the citation on the next page to Bin Cheng talking about the impact of failing to follow an international tribunal's decision, but Mr. Chairman, we understand that the Tribunal was interested in this issue. These are two authorities that directly bear on the notion of not complying with an international tribunal's order, and we understand from your letter before the Hearing that the legal record is not closed.

(Tribunal conferring.)

PRESIDENT GREENWOOD: We will allow these authorities in. I think the discussion at the opening submissions was such that it was entirely reasonable for both sides to supplement the authorities they relied on. Indeed, I myself asked you to refer to a case that wasn't in the record, but we would like copies, please, provided electronically with an updated index--or, let's just say, a new index with the authorities that have come in since the big--produce, if you would, a new hyperlinked list of the supplementary documents and authorities.

Don't redo the big one that's already there because I certainly have annotated some of those documents already, but I would like a new one just covering the new documents, new authorities.

And also, Mr. Luz, if you feel that you are unable to respond properly to these authorities this afternoon, we will entertain an application for a Post-Hearing Brief on them.

MR. LUZ: Thank you. And that was really my point, is that we have not had the opportunity to even read the cases, so I don't think we will be able to this afternoon, but we will take the offer under consideration.

PRESIDENT GREENWOOD: Thank you.

I think my colleague Mr. Rowley says you could always read them over lunch, but I think that might be demanding rather a lot in terms of access to materials via the Internet.

Yes, carry on, Mr. O'Gorman.

MR. O'GORMAN: Thank you, Mr. President. Just as the ICJ noted the duty to cease after the issuance of its judgment, the Iran-U.S. Claims

Tribunal was faced with a similar situation. In its 2004 Decision in Case A33: "In the original proceeding, the Tribunal held that Iran had been in noncompliance with its obligation to replenish the designated account that secures payment of claims against Iran."

Despite this Declaration and finding, the Tribunal did not actually specifically order Iran to replenish the account as a matter of specific performance.

After the original decision, Iran continued to fail to replenish the account. The U.S. then went on to file a new claim premised on this failure to cease the noncompliance.

The Iran-U.S. Claims Tribunal held that the U.S.' claim in the second or present case and its claim in the first case were not identical, but more importantly, that the U.S. is entitled to assert a new claim based on Iran's noncompliance.

The Iran-U.S. Claims Tribunal cites Mr. Bin Cheng for the proposition that, in the case of a judgment declaring an act to be unlawful, this

Decision entails an obligation on the State which has committed the act to put an end to the illegal situation created thereby.

As you may recall from the opening, on the 5th of July 2012, which is shortly after the May 22nd, 2012 Decision by the Mobil I, ExxonMobil writes to the Board in Canada and states: "In light of the Tribunal's finding that the Guidelines violate the NAFTA, we write to request that the--

PRESIDENT GREENWOOD: You can assume we have read this letter.

MR. O'GORMAN: Certainly.

They also sought not only the cessation of conduct with respect to the Shortfall up until 31 of December 2011, but also the assurance that the Guidelines would not be enforced for 2012 or any future period.

The Board responded on the 9th of July, saying, "No, we will continue to verify an Operator's obligation to ensure R&D, and there is no intention to waive in whole or in part any of the Operator's obligations under the R&D Guidelines.

The Mobil I Decision triggered Canada's duty to cease enforcement of the Guidelines. As noted, the Mobil I Decision determined that Canada's enforcement of the Guidelines was in continuing breach of its obligations under 1106, and that Decision obligated Canada to cease the illegality created by the enforcement of the Guidelines.

How does that fit into the NAFTA framework? Well, let's look at two NAFTA cases.

In Bilcon, they state--Judge Simma states: "In the present case, the Tribunal finds it possible and appropriate, as did the tribunals in Feldman, Mondev and Grand River, to separate a series of events--

PRESIDENT GREENWOOD: When you say Judge Simma states, this is the Award of the Tribunal, isn't it?

MR. O'GORMAN: Yes, it is.

PRESIDENT GREENWOOD: It is not Judge Simma's own personal opinion?

MR. O'GORMAN: Yes, that's correct. He was--I believe he was the Chairman of the Tribunal,

but yes, it is the Majority. It is the unanimous decision.

So, in that case, the Tribunal, following tribunals in Feldman, Mondev and Grand River, found proper to “separate a series of events,” which is a very intentional phrase, “into distinct components,” some that are time-barred, “some still eligible for consideration on the merits.”

Grand River applied a similar approach: "The Tribunal is not persuaded that the time bars under 1116(1) and 1117(1) can be applied to preclude Claimants from seeking to show that they suffered legally distinct injury on account of the legislative actions in that case."

PRESIDENT GREENWOOD: Help me with this, please. I have to go away and reread Grand River, but I'm surprised that it's 1116(1) that they're talking about rather than 1116(2).

MR. O'GORMAN: Okay. We think that might be a typo.

PRESIDENT GREENWOOD: Right.

MR. O'GORMAN: We think they were talking

about 1116(2).

PRESIDENT GREENWOOD: Thank you.

MR. O'GORMAN: My apologies, and thank you for pointing that out.

In this case, Mobil has brought this claim within three years of the Board's 9 July 2012 Decision not to cease the implementation of the Guidelines in light of the Mobil I Decision. The earliest date on which Mobil could be said to have acquired first knowledge of this distinct act was the 9th of July when the Board notified Mobil of its failure to cease enforcement of the Guidelines notwithstanding the Mobil I Decision's finding of illegality. This date is within three years that the present claim was made; and, therefore, on the alternative case, Mobil's claim is timely.

If I could now turn to abuse of right.

As everyone is probably familiar with our argument at this point, Canada has the duty of full reparation. Even if Canada's assertions on time bar were technically correct, which we believe they are not, an argument in the present case constitutes an

abuse of right. The general principle is that, in international law, a State exercising a right for a purpose that is different from that which that right was created, commits an abuse of right.

In the case of Renco versus Peru, almost three years after the case was brought, Peru first argued that the form of waiver submitted by the Claimant in that case was ineffective. The Tribunal granted the dismissal, but it cautioned that Peru's anticipated invocation of a time bar in a second case could well be abusive: "The Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred" under the limitations period, I believe, of that Treaty.

In other words, the Tribunal was concerned that, having waited three years to raise the waiver issue, it would be unfair for Canada then to go out--excuse me, not Canada, for the State to go and argue--Peru to argue that the limitations period prevented the second claim.

The situation here is similar except much worse. In addition to taking inconsistent positions, in the first case "too early," and in this case now "too late," Canada has been breaching the NAFTA throughout this period of time, as it has admitted.

In the Mobil I Case, as discussed, Canada argued too early. At that time, sadly, presciently, Mobil warned that “Canada can't have it both ways and say that we are not entitled to future damages and they are only waiving the limitations period with respect to this proceeding.”

The Tribunal ultimately accepted the form of Canada's interpretation of "incurred" requiring actual loss and did not rule on life-of-field damages. Instead, it told Mobil to file claims for actual damages as they are incurred. In accordance with that Decision, Mobil filed the present claim for actual damages, and that claim was filed while the first case was even still pending. As you know, Canada now argues Mobil is too late.

Under the guise of the limitations argument, Canada now attempts to evade its duty to make full

reparation to Mobil for an internationally wrongful act while that act, in fact, continues. Canada should not be able to blow hot and cold in a way that clearly is intended to preclude Mobil from seeking full reparation for the breach that remains ongoing to this day. Accordingly, the assertion of a time bar should be held to be an abuse of right.

Now, Mr. President--

ARBITRATOR GRIFFITH: Excuse me, implicit in that submission would be that Mobil may maintain on a rolling basis successive three-year claims until the expiry of the Concession, which, of course, that's not of any concern to the Tribunal.

MR. O'GORMAN: I'm not understanding your question.

ARBITRATOR GRIFFITH: Well, if you're right on the abuse-of-right issue, you're saying that every three years a new claim can be commenced for which there is no answer.

MR. O'GORMAN: As I've indicated, Mobil, of course, hopes that Canada will cease its wrongful conduct; but, under the current framework and given

both the requirement of the Mobil I Tribunal that Mobil can only claim for losses actually incurred and given the UPS instruction on the temporal time period of what damages can be claimed, it necessarily is incurring, and the claims will be brought or have to be brought in three-year increments at this point.

Okay. Turning, now, to res judicata. Res judicata in international law, citing some of the authorities suggested by the Tribunal, is a doctrine that requires final adjudication and attaches to a final decision of an international tribunal. The requirements of res judicata are stringent, and international tribunals and courts have frequently reaffirmed the doctrine while in principle denying its application, oftentimes, to particular cases.

A brief overview of res judicata.

The Mobil I Majority determined that a claim for damages not yet incurred was not ripe and, hence, not admissible. Moreover, that claim was not decided on the merits and, hence, not res judicata.

PRESIDENT GREENWOOD: I might pick up with you, but while they certainly said it was not ripe,

and there is a dispute about what that means, they did say in 477 that it was admissible.

MR. O'GORMAN: Yes, we will--

PRESIDENT GREENWOOD: They may not have meant to say it, but they did.

MR. O'GORMAN: Yes, they certainly said the word. Our position is they did not mean to say that word. But ultimately, it really doesn't matter because it wasn't decided on the merits.

Further, even if the Mobil I Tribunal was somehow incorrect by not deciding the merits of the claim, that Decision would nevertheless not have preclusive effects. Mobil--in other words, Mobil is not precluded from bringing its claim for damages now because such a claim could not have been decided in Mobil I on the merits.

And my goal, Mr. President, is not to walk you through once again in painful detail the Mobil I Decision. I think we've all taken a look at it, and we've all seen what it says; but, in the analysis of jurisdiction in the Mobil I Decision, the Tribunal stated that that was an argument raised by Canada

with respect to Article 1116(1), and the Tribunal stated: This "does not, in our view, as a jurisdictional matter, preclude the Tribunal from deciding on appropriate compensation for future damages. However, this conclusion only determines whether a claim for damages is admissible." There is the word. "It does not determine how compensation for future damages is to be assessed or whether it is appropriate for this Tribunal to consider damages or to make an award for compensation with regard to the future damages claimed in this particular case. These matters remain to be addressed."

Our position, Mr. President, is that the word "admissible" contained one time within the jurisdictional section of the Decision, simply does not constitute a finding, a discussion or any indication that the Parties were arguing admissibility in this particular section or that the futures damages claim were, in fact, admissible.

From the context, it's clear that the Tribunal used the word interchangeably with jurisdiction since there were no submissions and no

positions on admissibility. This argument is buttressed by the remainder of the--

PRESIDENT GREENWOOD: Mr. O'Gorman, let me just try and tease out a little bit more about that.

The comment of the use of the word admissible--

The passage which refers to admissibility is dealing with Article 1116(1). This is why I asked you about the Grand River passage. Your submission is that 1116(2) goes to admissibility, not jurisdiction.

Now, without suggesting that I either accept or reject that submission, do you make the same submission about 1116(1)? Is 1116(1) a matter of admissibility or a matter of jurisdiction?

MR. O'GORMAN: As found by the Mobil I Tribunal, which we do not seek to resile, 1116(1) was found by that Tribunal to be a jurisdiction matter.

PRESIDENT GREENWOOD: Right. So, your position is that 1116(1) is jurisdictional, but 1116(2) is a matter only of admissibility?

MR. O'GORMAN: Yes, that is our position, and

it's supported by the case law that we have cited to the Tribunal.

PRESIDENT GREENWOOD: Thank you.

MR. O'GORMAN: The argument on admissibility is buttressed by the analysis that the phrase "this conclusion" in the relevant sentence refers to findings of jurisdiction.

But, in any event, having found jurisdiction, the Tribunal went on to address ripeness; and, for the time period 2010 to 2036, the Tribunal noted that the Claimants are likely to incur a legal liability that would give rise to potentially compensable losses. The claim for such losses is not yet ripe for determination.

The Tribunal goes on, as Mr. Rowley noted the other day, but rather to a finding--excuse me--"there is too much uncertainty at this stage for the Tribunal to make a determination."

With respect to the determination that future damages were not yet ripe, we cite to Walters. Tribunals often issue decisions based on objections regarding preconditions to arbitration, including

ripeness. As Professor Paulsson has explained, these objections raise questions of admissibility.

And, critically, for the international law lens, we turn to the Waste Management Decision that say for both decisions--excuse me--for both dismissals based on jurisdiction or decisions concerning admissibility, these do not constitute decisions on the merits and do not preclude a later claim before a tribunal which has jurisdiction.

Now, in Canada's--

PRESIDENT GREENWOOD: Are you saying, then, that the Mobil I Tribunal found that the claim for future damages was not admissible?

MR. O'GORMAN: Yes, the answer is yes, the Mobil I Tribunal did not find the claim of future damages to be admissible.

PRESIDENT GREENWOOD: No, that's not the same of what I asked you. I didn't ask you whether they did or didn’t find it to be admissible. I asked if they found it to be inadmissible, at least that's what I thought I said.

MR. O'GORMAN: We believe that the finding of

not ripeness is the same thing as a finding of inadmissibility.

PRESIDENT GREENWOOD: It's a bit difficult, isn't it, if they've actually said in terms the opposite, even if they maybe misspoke.

MR. O'GORMAN: There is no doubt that the word is included in the paragraph when they're discussing jurisdiction, but I believe that the issue was not before that Tribunal and that should not constitute a finding of admissibility. But, as we will go on to show, largely, I think you probably need not reach that issue because ultimately it's not a decision on the merits.

PRESIDENT GREENWOOD: If the issue of admissibility was not before that tribunal, then how could they have made a finding that the claim was not admissible? It cuts both ways.

MR. O'GORMAN: I misspoke. I misspoke. You're right to point that out.

PRESIDENT GREENWOOD: Let's continue.

MR. O'GORMAN: Yes.

ARBITRATOR ROWLEY: Just before you do--and

this is for Canada--it seems to me that when they dealt with their jurisdiction dealing with Article 1116(1), they said that their view on jurisdiction does not determine whether it is inappropriate--whether it is appropriate to deal with making an award on compensation of the sort claimed. And I would have thought that when they then say, as you see in Slide 74, when they're dealing with ripeness, the Tribunal has applied the reasonable certainty discussed above, and they're obviously talking about future damages and the lack of reasonable certainty that is asserted, and they say this has not lead to a conclusion, but rather to a finding that there is too much uncertainty. And then they go on to say that they're not going to deal with it.

I would have thought one can just forget about admissibility. If one were arguing for Claimant, one would say the Tribunal had jurisdiction. That didn't mean they had to deal with this issue, and they made it very plain that they weren't going to deal with it. And if that's the

case, there is no decision on that point, and that's the end of the res judicata argument.

I mean, I think that's how I summarized where Claimant would be on this, and so I really make that point for Respondent to deal with this afternoon.

MR. O'GORMAN: Thank you, Mr. President.

Canada has effectively conceded that, when linked directly to jurisdiction or admissibility, ripeness may, in fact, be relevant for the res judicata analysis. But, instead, Canada argues that this conclusion of ripeness related to evidentiary matters is somehow different.

Canada specifically argues that Claimant failed specifically at the evidentiary stage, and that the failure stemmed from the specific-damages model.

Well, as you will recall, the Tribunal was guided by applying the standard of losses incurred, not failure of evidence, and that's set forth in the first quote on the slide.

They go on to note that, with respect to evidence of damages--which they say is not ultimately

strictly relevant--they have highlighted some uncertainty of the evidence. And they say that it's not strictly relevant because the Tribunal was not inclined to compensate for expenditures not paid or levied; i.e., required to be paid.

But even if the Tribunal referred to the uncertainty of the evidence regarding damages not yet incurred, it by no means decided a claim for such damages on the merits, which is required by res judicata. The Tribunal was very kind to cite us to the Nicaragua versus Colombia Case. And, Mr. President, given your intense familiarity with that case, please call me out if I say anything that's not correct about that case.

But the Majority Judgment, or the Judgment of the Court, they stated: "The Court cannot be satisfied merely by," effectively, the triple-identity case test. "[I]t must determine whether and to what extent the first claim has already been definitively settled."

In fact, the Court goes on to note: "[A]lthough in the earlier judgment, it declared

Nicaragua's submission to be admissible . . . it does not follow that the Court ruled on the merits of the claim."

There are very salient aspects of that decision, which we should point out. In that case, the Court held--

PRESIDENT GREENWOOD: It's not calling you out, exactly, Mr. O'Gorman, but I do think it's important that the quotation is accurate. The quotation from Paragraph 72 contains three full stops in the middle of it. I'm always suspicious of that in the middle of the sentence.

What the Court said was: "The Court first notes that, although in its 2012 judgment it declared Nicaragua's submissions to be admissible"--and the bit you've left out is, "it did so only in response to the objection to admissibility raised by Colombia, that this submission was new and changed the subject matter of the dispute."

Now, that's not quite the same thing as the issue we have here. The ICJ has a rule that you may not amend your claim in a way that alters the subject

matter of the dispute. And, in the earlier case, Colombia had argued that when Nicaragua--it's a complicated background. Nicaragua lost a Preliminary Objection in--well, it won, but it also lost an issue in 2012--in 2007, rather. It then changed its basic claim. Previously, it had only claimed a 200-mile continental shelf--but, on the basis that certain islands were Nicaraguan. In 2007, the Court held they were Colombian.

Nicaragua then changed its position and said, well, it was entitled to an extended to a Continental Shelf; right?

Now, Colombia argued that that was an entirely new claim that changed the subject matter of the proceedings; that it was inadmissible on that ground.

But that's not at all the same thing as inadmissibility on a time-limit point.

MR. O'GORMAN: Yes--thank you for that clarification.

The interesting thing, one of the salient aspects of that case that stood out to me, in

addition to the finding of admissibility on that very specific point--obviously important for the ICJ--the first decision did not contain language expressly stating that a new claim could be brought.

And, importantly, the dispositif from the original judgment said the Court cannot uphold the claim; again, the dispositif being an important aspect to look at for the effect of the Mobil I Decision.

Despite all of these factors, the Court still held that the claim in the 2016 proceedings was not barred by res judicata.

And in the, of course, very impressive and capable opinion of Judge Greenwood, he noted, of course "On any analysis, the 2012 judgment did not decide upon those claims." And that is the central analysis.

PRESIDENT GREENWOOD: And what I probably ought to say is that the rival analysis was vastly better. But I won't do that to you. But do continue.

MR. O'GORMAN: But Judge Greenberg, right

there, put his finger on the important question of whether it decided upon those claims in the earlier case.

The dissent was also helpful to me for something that it said, and something that it pointed out. And I will do my best to read this. And, Judge, please tell me if I get something wrong.

The Dissent stated: "In previous cases, whenever the Court intended to admit the possibility of future proceedings, it expressly provided for such possibility for parties to return to the Court following delivery of a judgment," and then cites a number of ICJ cases.

The Court, of course, also noted that it's necessary to ascertain the content of the decision when reviewing res judicata claims.

Now, in the present case, without belaboring the Decision--I know the Tribunal has spent a lot of time looking at the Mobil I Decision--there simply is no decision on the merits of the future-damages claim contained in the Mobil I Decision.

Importantly, the dispositif does not state

that claims for future damages were denied on the merits. In fact, as you see in Item Number 5, the Tribunal expressly found that it had jurisdiction. There is no reference, though, to admissibility, and there is certainly no decision rejecting future-damages claims.

Instead, the Tribunal said other things: "Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings." That's very much in keeping with the notion stated by the ICJ dissent of an invitation to bring future claims, and that being a hallmark--a hallmark--of the issue that the claim had not actually been decided on the merits.

Mobil I goes on to say in the Award this time: "This current assessment necessarily leaves unprejudiced the compensability of shortfall damages," and reading on, "or indeed the compensability of spending not accounted for here."

But even if the Mobil I was incorrect by not

deciding the merits, there is still no preclusive effects in this case. The First Tribunal's failure to take up an issue and decide it should not be held against the party who brought the claim; rather, a subsequent Tribunal--in this case, this Tribunal--can decide it.

Mr. Rowley very helpfully cited us to the Vivendi Cases. The First Tribunal in Vivendi made a determination that was found to be incorrect by an annulment committee. The Committee ruled that since the First Tribunal was incorrect, a new tribunal could determine the issue that the First Tribunal did not take up, even though it had jurisdiction: "Because the ad hoc committee confirmed the jurisdiction of the First Tribunal, and annulled the portion of the First Tribunal's Award where it declined to deal with those claims on the merits, this Tribunal is now charged with resolving all claims for treaty breach."

This is just a long way of saying: the First Tribunal did not decide the issues of the damages currently sought in the present case, and that

non-decision, or that express decision actually not to decide that, now leaves it for this Tribunal to decide the quantum of damages upon finding of its jurisdiction for the 2012 to 2015 time periods.

PRESIDENT GREENWOOD: Does Vivendi really help you, Mr. O'Gorman? If the First Tribunal's decision on that issue was set aside by the Annulment Committee, it couldn't create a res judicata anyway, could it?

MR. O'GORMAN: Let me think about that for a second.

That's true, and it's the--ultimately, though, it's the finding that a non-decision effectively remains--keeps the issue open. And, in the Mobil I Decision, there is an express invitation and direction for the Claimant to seek future damages in further NAFTA proceedings. And that is the significant matter, as noted by the ICJ, as the "hallmark" of a decision not having been made on the merits. Otherwise, that language would be entirely superfluous.

Now, Canada makes an argument that, well,

even if the damages weren't brought or sought, they could have been brought and, therefore, somehow should be barred by res judicata. I think there is a very legitimate question as to whether that type of common-law-preclusion tool applies with respect to international arbitration. And they cite the aged Delgado Case.

But, in any event, that doctrine, even if it were to apply on the law, does not apply on the facts, because we do have, effectively, the decision of the Mobil I Tribunal stating that the claims for future damages could not yet--could not be brought in that proceeding.

Let me turn now to an issue that the Tribunal specifically asked about in one of the previous sessions, and that is: What is it that Mobil is claiming should be afforded res judicata aspects with respect to the Mobil I Decision?

And the standard for issue preclusion has been set forth in the Grynberg Decision, which I'm sure Mr. Rowley is very familiar with, and that requires a binding nature of an issue decided if it

was distinctly put in issue, the Tribunal actually decided it, and its Resolution was necessary to the decision.

So, what are the important and salient aspects of the Mobil I Decision and Award?

First, that the Guidelines breached 1106 and are not reserved under 1108. I think, given Canada's concession on that issue, that that is where we are.

Also, the meaning of damages "incurred."

As the Tribunal stated, given--and this is, Mr. Chairman, this is a problem with our quotation that we've identified. So, if I can read the full quote--we accidentally left some language out. The full quote says: "Given the that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."

As we discussed, Mr. President, earlier this morning, Canada is estopped from disputing that Claimants can claim compensation in new NAFTA proceedings for losses which were not actual in the

Mobil I proceedings, merely on the grounds that the losses became incurred more than three years after the Guidelines were imposed. Only this rule will give full meaning to the Mobil I Decision which, through this holding, addressed limitations. This decision was necessary to dispose of the claims before the Tribunal.

In closing, Mr. President, Mobil has been diligent and reasonable at all times since the Board began imposing the Guidelines against its investments. Canada has erected roadblocks in an attempt to evade its obligation of full reparation. At times, it's argued that Mobil's claim was "too early," at others "too late," but always it has argued "no compensation."

In fact, and even, perhaps, more troubling, Canada continues to enforce and apply the Guidelines in the face of a decision in 2012 that those Guidelines breached NAFTA. If Canada's limitations or res judicata arguments were accepted, it would avoid--Canada would avoid its duty of full reparation for the damages incurred in this case.

Moreover, and equally concerning, such a decision would allow Canada to breach the NAFTA with impunity, through 2040 and beyond, with Mobil sustaining grave damages in that time period.

This would cause a grave injustice to Mobil, and we humbly request the Tribunal to remedy the situation, and to allow compensation to Mobil so that it may seek its full reparations and receive its full reparations for damages in the time period before the Tribunal.

Mr. President, Dr. Griffith, Mr. Rowley, thank you very much for your attention. It's a personal pleasure to be in front of you. And thank you for your patience and your understanding.

And I'm happy to address any questions you may have.

PRESIDENT GREENWOOD: Thank you very much, Mr. O'Gorman.

Dr. Griffith?

ARBITRATOR GRIFFITH: Will we have an electronic copy later today?

MR. O'GORMAN: I'm sorry?

ARBITRATOR GRIFFITH: May we have an electronic copy?

MR. O'GORMAN: Of course. We're happy to give that to you.

And we will also--if we may, Mr. President, we'll correct that one quote where we inadvertently left out those few words.

PRESIDENT GREENWOOD: Incidentally, the other quotation that I questioned, the references to 1116(1) and 1117(1) are in Grand River. If it's a typo, it's the Grand River Tribunal's typo, not yours.

MR. O'GORMAN: Okay.

PRESIDENT GREENWOOD: Just to save any time.

Mr. Rowley, do you have any questions?

ARBITRATOR ROWLEY: No, thank you.

PRESIDENT GREENWOOD: Well, thank you very much. We are grateful to Mobil for its very full submissions.

And we will look toward to hearing Canada this afternoon at, I think, 1:00.

Good. Thank you all very much.

MR. LUZ: Thank you.

(Whereupon, at 11:25 a.m., the Hearing was adjourned until 1:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT GREENWOOD: All right, ladies and gentlemen. Welcome back.

And Mr. Luz, we look forward to hearing from you.

Are you doing it all yourself, or are you sharing?

MR. LUZ: We were just joking that we really wanted to challenge ourselves that we could do a switcheroo right on the spot where I decided to time bar and my colleague, Mr. Douglas, will do res judicata, but I think we're going to stick with the game plan, where we're going to try and be brief, we're going to try and answer all the questions that the Tribunal has asked both from Monday and issues that came up today.

And as I said, my colleague, Mr. Douglas, will be addressing questions of time bar, and then I will deal with res judicata, and hopefully, in Canada's submission, at the end of the day, as I said at beginning of the week, that our goal was not only to convince the Tribunal that it was legally required

to dismiss this case, but that it was the fair and reasonable thing to do, and so that's our goal for today, and I will hand the podium to my colleague, Mr. Douglas.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. DOUGLAS: Good afternoon, Mr. President and Members of the Tribunal.

I do not propose to address the arguments I made in my opening remarks on Monday per the Tribunal's request. My intention here is to address the questions posed by the Tribunal on Monday. So, what I propose is to do that first. And then, at the end of my presentation, I will turn to a response to certain arguments raised by the Claimant in its opening presentation.

My presentation will follow, at least for the first part, four arguments:

First, that the failure to cease the enforcement of the 2004 Guidelines is not a breach that has been properly placed before this Tribunal.

And, second, there is no obligation to cease the enforcement of the 2004 Guidelines under

international law.

Third, there is no obligation to cease the enforcement of the 2004 Guidelines under NAFTA.

And, finally--and this is where I will respond to many of the Claimant's arguments--that Claimants had knowledge of breach and loss before the limitation period cut-off date and, as a result, this Tribunal should bar its claim.

Now, I do not mean to open on a sour note, but the Claimant has argued consistently that the Guidelines are a continuing breach and that the specific breach for the purpose of the limitation period that it raised for the first time in its Reply Memorial is the express failure of Canada to cease applying the Guidelines to Mobil on the basis of the findings in the Decision. Canada will attempt to address this argument today, but before we do, we must submit, that we do not believe that this question of whether the Board's failure to cease the application of the Guidelines and the consequence this alleged breach has under the limitation period, has been properly put before this Tribunal.

In its Request for Arbitration, the Claimant specified the breach at issue in its claim is the adoption of the Guidelines, which they characterized as a continuing breach of the NAFTA. They did not allege the failure of Canada to cease applying the Guidelines as a separate breach.

For example, the Claimant states that it has satisfied the NAFTA's six-month cooling-off period because it has been six months since the adoption of the Guidelines and six months since it began to incur the actual damages that it will claim. There is no mention in the Request for Arbitration of the Board's failure to cease as a separate breach of the NAFTA after the Decision on Liability.

Upon receipt of the Claimant's Request for Arbitration, the ICSID Secretariat wrote the Claimant and asked it to identify the alleged breach at issue in its claim in light of the limitation period under Articles 1116(2) and 1117(2). And per your request, Mr. Tribunal, I will refer only to one since both equate with each other from here on in.

In response, the Claimant confirmed that the

alleged breach at issue in this claim is the Board's continued enforcement of the Guidelines as of January 1st, 2012. Again, there was no mention in the Claimant's response of a separate breach regarding the failure to cease its application of the Guidelines in the Decision on Liability.

And, based on this representation, the ICSID Secretariat registered the Claimant's request on February 18th, 2015.

Now, in its Memorial, the Claimant, again, did not allege that the Board's failure to cease its application of the Guidelines after the Decision on Liability constitutes a separate breach of the NAFTA. In fact, as I mentioned, it was only in its Reply Memorial for the first time that Claimant alleged this new breach. And they make this argument under the heading of the "limitation period," arguing that this new breach is within the limitation period without specifying what that breach is.

In Canada's Rejoinder, we made our position on this new alleged breach clear. First, we did not believe that the Claimant could argue a new breach of

the NAFTA in its Reply Memorial; and, second, we did not believe they could do so without further elaborating on the nature of that breach.

From Canada's standpoint, this new breach is still somewhat ambiguous. We take the Claimant to mean that there has been some kind of breach of customary international law arising from the non-repeal of an offending measure. We do not think that there has been such a breach in this case. And we'll discuss this point in a moment, but it's not clear to us whether that Claimant's alleged breach even falls within the regime established by Section B of NAFTA Chapter Eleven, and it is axiomatic to say that a NAFTA Chapter Eleven Tribunal only has authority to the extent that it is provided by Chapter Eleven itself.

So, it's not the breach that has been pled by the Claimant. It is the adoption of the 2004 Guidelines as a continuing breach. This has been their case all along, so we do not see how this new alleged breach is even relevant or at issue at all.

We, therefore, do not believe that this

breach has been properly put before this Tribunal, and that Canada has not been given effective notice to deal with it. But in any event, we have done our best in the last few days to do so. And, with that, I would like to turn to the argument.

PRESIDENT GREENWOOD: Before you do that, Mr. Douglas, is there a difference between a continuing breach in the form of a continued enforcement of the Guidelines and a failure to cease enforcement of the Guidelines?

MR. DOUGLAS: Yes. I think we would see that distinction. We would see the failure to cease as being some obligation, it may be owed at custom. We do not see how the failure to cease equates with the enforcement of the Guidelines. The two are distinguishable, in my mind.

PRESIDENT GREENWOOD: Isn't it just two ways of saying the same thing? If I'm charged with assault because I'm hitting someone, is there a difference between my hitting them and my stopping--my failure to stop hitting them?

MR. DOUGLAS: Well, I guess one is whether

there's an obligation to cease and whether there is an obligation not to continue to enforce.

PRESIDENT GREENWOOD: But if there is an obligation not to do something and you are continuing to do it, is that not implicit in the obligation not to do this, an obligation to stop doing it?

MR. DOUGLAS: Well, I guess the distinction is in the Measure -- is the continued enforcement of the Guidelines in the limitation period. That is indistinguishable from past performance of the Guidelines. There is no difference in the enforcement between what has happened in the past and happened in the future. If, however, there is a claim that NAFTA has been breached from a failure to cease, I feel that comes within a different category.

PRESIDENT GREENWOOD: All right. Yes. Thank you. I have your submission.

ARBITRATOR ROWLEY: Just before we leave that, did I understand you to say that Canada's position is that it has not had effective notice such as to be able to deal with this allegation of failure to cease?

MR. DOUGLAS: Yes, that is correct.

ARBITRATOR ROWLEY: And am I correct in understanding that failure to cease was alleged in the Reply?

MR. DOUGLAS: I guess the question is--and maybe this goes to Judge Greenwood's point, and maybe the matter can be put to rest--if the question is the continued enactment or enforcement of the Guidelines, then I think that's fine. But if there is an alleged breach of a failure to cease at custom some obligation that the State has undertaken or has to do that, then that is something that has not been properly pled.

There is a reference to such a breach in one paragraph in the Claimant's Reply Memorial, but they do not elaborate; and, from that standpoint, we don't feel that we've had effective notice to address that new breach.

ARBITRATOR ROWLEY: And so, remind me, please, the date of the Reply.

MR. DOUGLAS: The date of the Reply? September 26, 2016.

ARBITRATOR ROWLEY: And Paragraph 77 of the Reply says the "specific breach for the purposes of Articles 1116(2) and 1117(2) is the express failure of Canada cease applying the Guidelines to Mobil."

And so, that's not sufficient. What should they have said to make it sufficient or to give you a chance to deal with it?

MR. DOUGLAS: I think if there is an alleged breach, like if there is an obligation to cease and there is a breach of the NAFTA in that respect, that's what I think we would be looking to have explained. If the alleged breach--if this is just a different way of formulating the continued enforcement of the Guidelines, I think there is no problem, but we raised this in our Rejoinder. We mentioned whether if this is a new breach, this is concerning for us because we did not feel that it could be pled at this stage without further elaboration.

ARBITRATOR ROWLEY: Does Canada accept that there is properly before us an allegation of breach of the NAFTA 1106 by Canada's continuance to enforce

the Guidelines following their having been found to be an unlawful measure?

MR. DOUGLAS: I think the subtle distinction there is we do believe what is properly before you is the continued enforcement of the Guidelines. I don't think there is before you the continued enforcement of the Guidelines following having been found the Measure to be unlawful.

If Canada has some obligation--and we will discuss this in a moment, and I hopefully will be able to address all of your questions--if Canada has an obligation pursuant to the Decision under the NAFTA, that is news to us. We do not believe that's the case. We do not believe that the Decision imposes on us any obligations under the NAFTA or obligations under the text itself.

So, formulated in that way, I'm not sure I would agree.

ARBITRATOR ROWLEY: I'm sorry, I'm not making myself clear: 1106 is where Canada finds its obligations. One of the obligations is not to enforce an unlawful measure.

MR. DOUGLAS: Correct.

ARBITRATOR ROWLEY: The Measure was found unlawful by the Tribunal. Following that finding, does Canada accept that there is an allegation that you continued to enforce an unlawful merger--measure?

THE WITNESS: I think whether or not the Measure is unlawful is founded and grounded in the terms of the Treaty. I do not think it's found in the Decision. So, if you're talking about a breach of the NAFTA in light of the Decision, then that seems to be something different to me. If we're talking about the continued enforcement of the Guidelines pursuant to the terms of the Treaty, then I believe that would be in front of you.

ARBITRATOR ROWLEY: I will let you get on with your--

MR. DOUGLAS: I feel we will turn to this shortly.

And why don't we turn to the argument. In deciding the issues before it, this Tribunal is bound by Article 1131 of the NAFTA, which states that a "Tribunal established under this section shall decide

the issues in dispute in accordance with this Agreement and Applicable Rules of international law."

If a rule of international law is not applicable, this Tribunal has no jurisdiction to decide the issues before it relying on that rule. The customary international law rule of cessation, therefore, is not, to use the words of NAFTA Article 1131, an Applicable Rule of international law to which this Tribunal can turn, and let me explain why.

As President Greenwood pointed out on Monday, separate from the NAFTA, States have obligations at customary international law. These obligations are owed to other States and the international community as a whole.

Part II of the ILC Articles on State Responsibility reflect these obligations. For example, as the Claimant pointed out in its opening, Article 30 requires cessation of an illegal act in the event it is continuing. Article 31 then requires certain reparations be made depending on the circumstances of the breach.

However, the ILC Articles and the rules of

customary international law that they reflect, are not applicable in the context of a dispute between a State and a non-State actor. They are not then applicable in the context of a dispute under NAFTA Chapter Eleven between an investor and one of the NAFTA Parties. This is made clear from the text of Article 33(2) which in reference to Part II of the ILC Articles states that this part is without prejudice to any right arising from the international responsibility of a State which may accrue directly to any person or entity other than a State.

This is also reflected in a commentary to Article 28 of the Articles of State Responsibility which notes that Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. However, the provisions, and I quote, "of Part II are without prejudice to any right arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and Article 33 makes

this clear."

To paraphrase Professor Crawford, if I may, Part II, then is limited to cases of inter-State responsibility only. As a consequence, the provisions of Part II, are and on their own terms, not directly applicable to questions of the content of the responsibility which may arise in the context of an investment arbitration as the result of a breach of the substantive obligations contained in an investment treaty.

This principle is reflected in numerous investment treaties themselves. Indeed, there is no consistent State practice or opinio juris with respect to remedies available to tribunals under ISDS provisions. Some allow for restitution, others only compensation. Others are silent on the issue altogether. In the latter case, perhaps it is open for tribunals under these treaties to decide issues in accordance with the Articles of State Responsibility or customary international law more generally. However, to the extent a matter covered in the Articles of State Responsibility or custom has

been ruled out by a Treaty as inapplicable in a particular case and there are no circumstances commanding otherwise, the Tribunal may not turn to the Part II of the ILC Articles as guidance. It is simply not open for this Tribunal to import public law concept into the investor-State scenario.

And the two cases cited by the Claimant this morning did not involve investor-State cases and are, therefore, inapplicable.

These rules are further confirmed by the principle of lex specialis. The ILC Articles do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international Responsibility of a State are governed by special rules of international law."

This is precisely the case the Tribunal has before it with respect to an investor under NAFTA Chapter Eleven. The principle of lex specialis provides that in the context of NAFTA Chapter Eleven. The general rules articulated in the Articles of State Responsibility with respect to cessation and

restitution do not apply. Article 1135 notes that where a Tribunal makes a final award against a party, the Tribunal may separately or in combination only Award monetary damages in any applicable interest.

Monetary damages, that is it. There is no obligation of cessation under international law that is applicable here. There is no jurisdiction for the Tribunal to find otherwise.

ARBITRATOR ROWLEY: Can you help us, please, as to the distinction between an obligation and a remedy and, in doing so, focus on the obligation not to enforce being an obligation under 1106--this is for argument purposes--and a remedy for breach of that obligation being only damages?

MR. DOUGLAS: The obligation is to not enforce, and the remedy is compensation. Let me give you an example that captures this case perfectly: Envision a scenario where the Mobil and Murphy Tribunal awarded the Claimant the compensation it sought. It awarded it compensation that it has claimed, which was compensation through to the end of the lives of the Projects. You would have a finding

that Canada has breached 1106 and awarded the Claimant compensation. Would Canada have an obligation to cease the Measure in that context? That surely would not be fair. The Claimant would both then receive compensation for the duration of the Project--

ARBITRATOR ROWLEY: It would be irrelevant because it would have been fully compensated for the breach in that case.

MR. DOUGLAS: But if we have been found to breach, do we have an obligation to cease?

ARBITRATOR ROWLEY: In a situation where you have not compensated and where you continue to enforce, that's the question that's before us.

MR. DOUGLAS: Ah, I think the question is-- is whether the claim was fully submitted and fully heard in the first arbitration and whether there is an obligation to cease simply because future damages were not awarded.

ARBITRATOR ROWLEY: I agree, that the res judicata is a question before us.

MR. DOUGLAS: I don't think, with respect,

you can apply the obligation to cease in one context and not the other. It's either there or it's not. It's Canada's position that it's not. That's not how the NAFTA is intended to work.

So, the line between obligation and remedy is slightly blurry.

PRESIDENT GREENWOOD: Mr. Douglas, I'm not sure it is blurred. Under Article 1106 of NAFTA, Canada has an obligation not to impose--well, that's a matter for the past now--or to enforce a measure which is contrary to the terms of Article 1106. It's common ground, as I understand it, that the 2004 Guidelines are contrary to Article 1106, so the enforcement of them--indeed, enforcement of them, is a breach of the NAFTA. That's the obligation.

MR. DOUGLAS: It is, but that matter has been heard.

PRESIDENT GREENWOOD: Well, I don't want to keep going around and around in circles. That's the res judicata argument, and we will come to that later. But let us assume for the purpose of this discussion that you don't get home on the res

judicata point. I'm not suggesting whether you will or will not, but let's leave that to one side. In those circumstances, if this is a matter which hasn't already been heard and hasn't already been ruled on, then you are in breach of Article 1106, are you not?

MR. DOUGLAS: I would say we were bound by that, but the current claim is one that's tied to the past.

Let me finish through my arguments and--

PRESIDENT GREENWOOD: Okay, fair enough.

MR. DOUGLAS: Because I don't think there is an obligation to cease in this context.

PRESIDENT GREENWOOD: When you do that, you may be coming to this, but clearly this Tribunal has no jurisdiction over a claim for a breach of customary international law. It has to be a breach of the provision of the NAFTA; otherwise, a Chapter Eleven tribunal doesn't come into it. At the same time, in ascertaining what a Chapter Eleven provision requires, we have to look to general international law, Vienna Convention on the Law of Treaties, for example, on Treaty interpretation. That doesn't seem

to me to be contentious.

MR. DOUGLAS: It's not contentious from Canada's part.

PRESIDENT GREENWOOD: Why not to the ILC Articles on State Responsibility to determine the effects of the wrongfulness of act? To merely say that they're without prejudice to specialist regimes doesn't mean to say that they don't apply at all in the context of that specialist regime.

MR. DOUGLAS: We view the ILC Articles as not applying in this context, for the very reason that the NAFTA Parties, when they wanted to incorporate the obligation to cease, they made it explicit in the NAFTA itself, and there are examples of this. It doesn't exist in NAFTA Chapter Eleven and, in that particular context, did not feel it can be imported through the ILC Articles into obligations under Chapter Eleven.

PRESIDENT GREENWOOD: Let me phrase it a different way: Any State that concludes a treaty has an obligation to perform that Treaty in good faith; is that right? You would agree with that

proposition?

MR. DOUGLAS: I would agree with that proposition.

PRESIDENT GREENWOOD: Good.

Now, are you performing a treaty in good faith if you continue to enforce a provision which is contrary to that Treaty and which has been held to be contrary to that Treaty?

MR. DOUGLAS: I think it depends on the contours of the Treaty. In this particular case, there was a claim, it was brought within the contours of Chapter Eleven. It was heard between the Parties. All of the evidence was filed, a decision was made, and Canada honored its obligations and paid. We do not think the current dispute falls within those contours. And we do not believe that the ILC Articles play a role in imposing an obligation to cease the Measure.

From our standpoint, we have fulfilled our obligations and the matter is closed.

PRESIDENT GREENWOOD: But you fulfilled your obligation under the Mobil I Award, but what about

your obligation to perform the Treaty?

MR. DOUGLAS: Well, then this gets into the obligation to cease. We don't see that there is an obligation to cease under the Treaty. The Treaty provides that an investor can file a timely claim and that the matter can be heard. If a breach is determined--pardon, sir.

PRESIDENT GREENWOOD: Suppose the Canadian Government gets a letter from the Government of the United States or the Government of Mexico saying, look, this type of requirement to purchase local services is in breach of Article 1106. Your Guidelines are a requirement to purchase local services, which has been held to be a breach of Article 1106. Why are you still enforcing it?

MR. DOUGLAS: In a hypothetical argument, there are mechanisms for that under Chapter Twenty, but a Chapter Twenty panel would find in that respect and whether the obligation ensues in that context, I have no idea.

Article--Chapter Twenty provides for cessation. It also provides for reparation in lieu

of cessation.

PRESIDENT GREENWOOD: Well, I better let you develop that argument. I sense we're coming to that point.

MR. DOUGLAS: But the reason for this is an important one, Judge Greenwood. The NAFTA Parties made a conscious choice, pay damages in lieu of cessation. They did this so that they could retain the right to regulate in the public sphere.

All three NAFTA Parties agreed. At the time Chapter Eleven was drafted, the regulation of the internal affairs should not be impinged by a third party, for example, a NAFTA Tribunal. Sovereignty is paramount. If a tribunal, therefore, finds Canada in breach of its obligations under NAFTA Chapter Eleven, Canada can be compelled to pay damages but in doing so maintains the right to regulate as it wishes. This allows an investor to be kept whole without eroding the legitimate policy-making power of the Government of Canada to regulate in the public interest.

These two things are not inconsistent in

international law, and it's important to remember as well that when the NAFTA Parties wanted to include cessation, as I mentioned, they did so in Chapter Twenty.

But let me turn, now, perhaps, Judge Greenwood, more directly to your question about whether there is an obligation under Article 1116 to cease. Canada does not believe there is such an obligation even within the words of the Treaty itself.

PRESIDENT GREENWOOD: Mr. Douglas, you said whether there is an obligation under Article 1116 to cease, do you mean 1106?

THE WITNESS: I did mean 1106. My apologies.

And you raised this point on Monday, Judge Greenwood, that whether in light of the Tribunal's Decision, Article 1106 of the NAFTA requires Canada to repeal the Guidelines or to cease to enforce them. And, with respect, we do not agree. We do not see anything in the language of 1106 that requires cessation. And from our standpoint, an obligation to cease should not be read into Article 1106, and this

is for--if you can indulge me--six reasons. Usually I like to provide three but this is a matter of some importance to us.

The first reason is, had the Parties intended for there to be an obligation of cessation, they would have made this explicit in the text itself. And not to repeat, but when the NAFTA Parties wanted to make this clear--I don't have much slides to go along with this--my apologies for that--but when the NAFTA Parties wanted to create an obligation to cease they did so in Chapter Twenty.

Reading the words, "may not enforce," which I believe Mr. Rowley suggested might contain an obligation to cease, to include that obligation would read into the text something that the NAFTA Parties did not contemplate.

ARBITRATOR ROWLEY: Can you tell me what "not to enforce" means? Obviously, I'm asking in the context where a measure has been found to be in breach of the NAFTA. Do we read it out of the section?

MR. DOUGLAS: I think, Mr. Rowley, we would

read those terms as (1) an obligation that accrues at the time of the imposition.

PRESIDENT GREENWOOD: That's quite important because the 2004 Guidelines were imposed on the 5th of November 2004.

MR. DOUGLAS: Correct.

PRESIDENT GREENWOOD: But they weren't enforced until sometime in February 2009, after the Supreme Court of Canada dismissed the petition for leave to appeal.

So, at what point does the Article 1116(2) limitation start to run?

MR. DOUGLAS: Well, from our standpoint, the Guidelines were first enforced against the Claimant much earlier in 2004, and I understand there has been some discussion about the court cases, which I'm not sure much turns on that at the end of the day, whether it's 2009 or 2004.

But the first imposition of the Guidelines on the Claimants--or on the Projects, I should say, rather, was in 2004.

PRESIDENT GREENWOOD: They were imposed, but

they weren't enforced.

MR. DOUGLAS: Correct. The Board and the Claimant reached--I should say HMDC and Suncor reached an obligation--sorry, undertook not to enforce the Guidelines, pending the outcome of the Decisions.

PRESIDENT GREENWOOD: The Board?

MR. DOUGLAS: The Board, yes.

PRESIDENT GREENWOOD: Very properly, the Board said, "While the case is pending, we won't enforce."

MR. DOUGLAS: But it also said that the obligations to comply with the Guidelines while the cases are pending is your obligation, and the amount that would be owed would be owed back to April 1st, 2004.

PRESIDENT GREENWOOD: That's perfectly normal practice.

MR. DOUGLAS: Then they took the risk that if they didn't want to comply.

PRESIDENT GREENWOOD: Yes.

I can't, at the moment, see a distinction

between a provision that says "no party may enforce any of the following requirements" and a provision that says "if you may not enforce it, then you must cease to enforce it." I just can't see a difference other than a semantic one.

MR. DOUGLAS: Let me walk through my arguments, and maybe I could explain the policy reasons why that's the case.

PRESIDENT GREENWOOD: It's not really a policy reason that I'm looking for. It's a textual one, but, anyway, you unfold your argument in your way.

MR. DOUGLAS: There is a limited set of remedies for every breach of the NAFTA; and, if you read into Article 1106 an obligation to cease, you're giving special remedies over other provisions.

Let's say, for example, the Mobil and Murphy Tribunal had found that the Guidelines breach both Articles 1105 and 1106. Would Canada only have an obligation to cease the measure pursuant to Article 1106? To us, that doesn't make sense, and there is no reason to treat Article 1106 different under

Chapter Eleven.

Third, the words "no party may enforce" can't include an obligation of cessation. And I have mentioned this argument already because Canada may have been ordered by the Mobil and Murphy Tribunal to pay the damages the Claimant sought. If that were the case, would we also have had an obligation to cease the Measure? As I mentioned already, I do not think that would be fair.

Fourth, the words "no party may enforce" are not written here to signal a continuing breach. For example, the enforcement of an obligation is not usually one imposed by States. Investors in investment contracts often undertake Performance Requirements themselves. The meaning of "enforce" in that context is a prohibition on the State from enforcing the Performance Requirement the investor agreed to undertake.

The words "no party may enforce," thus, do not necessarily signal a continuing breach.

Fifth--

PRESIDENT GREENWOOD: Sorry, you've lost me.

The words "no party may enforce" are not written here to signal a continuing breach. For example, the enforcement of an obligation is not usually one imposed by States. Well, it's not something imposed by States, it's imposed on a State. There is an obligation not to enforce a measure.

MR. DOUGLAS: I was drawing--trying to draw the term "enforcement" out of the continuing-breach context. Most often, Performance Requirements are agreed to by investors. In contracts, the application of this provision and the meaning of "enforce" in that context, the State is not able to enforce that undertaking by the investor under the Contract. That is how "enforce" under 1106 is most often understood.

Now, it might have a different context in this particular case, but, again, the word "enforce" does not signal a continuing breach.

PRESIDENT GREENWOOD: I have to say I'm having real difficulty understanding that argument.

MR. DOUGLAS: Okay.

PRESIDENT GREENWOOD: Because where you have

the words "impose" or "enforce" juxtaposed like that, what does the word "enforce" add to the word "impose," if it doesn't refer to a continuing obligation?

MR. DOUGLAS: Well, I was just trying to give a context where it doesn't, where the obligation--the imposition of a performance requirement is not one imposed by the State, but is undertaken by an investor. In that context, the State is under an obligation not to enforce the Performance Requirements in that contract. This is most often understood--how the word "enforce" is most often understood in this context.

PRESIDENT GREENWOOD: Just look at the text on screen.

MR. DOUGLAS: Mm-hmm.

PRESIDENT GREENWOOD: That's dealt with in the next clause, isn't it? "No party may impose or enforce any of the following requirements or enforce any commitment or undertaking."

Now, the phrase "or enforce any commitment or undertaking," that's the one that refers to enforcing

something that's in an agreement concluded by the Party or by the Investor. If you parse the sentence, you've got several different prohibitions there: A prohibition on imposing one of these requirements, a prohibition on enforcing it, a prohibition on enforcing any commitment or undertaking relating to them, and then there are various other ones which don't really concern us.

MR. DOUGLAS: It's possible. I was just trying to draw the attention that the word "enforce" here does not always signal a continuing breach, not a particularly strong point, I guess. I'm happy to move on.

PRESIDENT GREENWOOD: Okay. Let's move on.

MR. DOUGLAS: Sixth and, finally, reading Article 1106 as including an obligation to cease would provide investors with rights not contemplated. It would empower individual Claimants to challenge a performance requirement, not only for damages, but also the removal or amendment of an offending measure. This is what the NAFTA Parties contemplated. They would have made it explicit,

especially because the obligation to cease imposes on a State's ability to regulate. The NAFTA Parties would not constrain themselves in this way implicitly. For these reasons, we do not believe that Article 1106 prescribes an obligation to cease.

Now, to the next point, Mr. Rowley, you raised on Monday, that once the Guidelines are found to be prohibited, is there an obligation not to enforce them? With respect, the obligation not to enforce a performance requirement does not begin with the Tribunal's Decision. The obligation stems from the text of the NAFTA. A Tribunal's Decision does not create a separate obligation. The obligation is owed to the Claimant--pardon me, the obligation owed to the Claimant is found in the text of the NAFTA, nowhere else.

Canada did not adopt obligations under the NAFTA that depend on the Tribunal finding a breach. Investors may have a right to challenge, but the obligation stands independent of the Tribunal.

In this case, the Tribunal's Decision cannot change the meaning of the word "enforce" into an

obligation to cease.

ARBITRATOR ROWLEY: You know what the Tribunal--maybe you don't understand what I'm trying to say, and that's perfectly understandable. Many judges have not understood what I have been trying to say over the years.

(Laughter.)

ARBITRATOR ROWLEY: I consider that the Mobil I Tribunal's Award is of relevance to us here because it illuminates the fact that there has been the imposition of a measure which is unlawful. It illuminates. We now know the Measure is unlawful.

Do you see what I'm saying?

MR. DOUGLAS: I think whether we know or not is irrelevant.

ARBITRATOR ROWLEY: Well, then if you think about the obligations, the obligations arise because of the agreement of the Parties to the NAFTA as to how they wish to constrain themselves, and they have said, "We will constrain ourselves by not enacting or imposing measures that do certain things." That's a constraint on their power to legislate, and they've

agreed to that.

They have also, by using the word "enforce," said, "If, by chance, we legislate a measure that is improper, we also agree we shall not enforce it." That's the argument.

Now, the Tribunal, below has said, it turns out, "that the Measure is unlawful; therefore," the argument goes, "that enforcement now comes into play." There being an improper measure, 1106 creates an obligation not to enforce it. That's the argument.

MR. DOUGLAS: But the Measure did not become unlawful when the Tribunal said so, and the obligation not to--

ARBITRATOR ROWLEY: I didn't suggest for a moment it became unlawful when the Tribunal said so. It became unlawful when it was passed.

MR. DOUGLAS: Right.

ARBITRATOR ROWLEY: The Tribunal has simply, when the issue came before it, made the determination that it was unlawful, hence, passed.

MR. DOUGLAS: I think my only point is that

the Tribunal's Decision does not change the ordinary meaning of the text and doesn't impose upon Canada any additional obligations. Article 1106 does not change in character because of the Award. Article 1106 says, "Don't enforce." It doesn't say, "Don't enforce when someone tells you not to enforce," and it's the language of the text we must to look to, not the Tribunal's Decision.

I think our concern is that the Tribunal's Decision creates some kind of obligation outside of the NAFTA. For that, we would disagree. We do not think that's the case.

And so, another question you had asked, Mr. Rowley, was whether the decision to enforce the Guidelines after they had been found to be--

ARBITRATOR ROWLEY: Let me try it again.

MR. DOUGLAS: Sure.

ARBITRATOR ROWLEY: Up until the Award in Mobil I, Canada considered that its Measure was entirely lawful and it could be enforced; yes?

MR. DOUGLAS: Yes.

ARBITRATOR ROWLEY: Following the Decision,

as I understand it, Canada accepted that its Measure was unlawful.

I'm right on that, am I not?

MR. DOUGLAS: Correct.

ARBITRATOR ROWLEY: Now, having accepted that what you had previously believed to be a lawful measure was unlawful, what, then--how, then, does the obligation not to enforce come into play?

MR. DOUGLAS: My colleagues are encouraging me to try to bring this back to the limitation period, which maybe I can do in answer to your question.

I think our concern is that somehow the Decision changed something when it comes to the application of the limitation period. Our obligations to investors under the text of the Treaty itself, there is no new obligation that was created by the Decision. The enforcement of the Guidelines within the limitation period is the same enforcement that happened before the limitation period. The Board's annual letters to the Claimant pursuant to the Guidelines that they send every year is par for

the course, both pre-the-Decision and post-the-Decision.

When the Claimant first acquired knowledge of loss and breach, was as you've said, in 2009, at the latest--we would argue 2004, but either way it's inconsequential--that first acquire of knowledge does not change with the Tribunal's Decision. It's no new obligations are created there, the obligations are in the terms of the Treaty, and if you look at the enforcement of the Guidelines pursuant to the Treaty, it's the same enforcement that has been happening since 2004. There is nothing different. Nothing has changed. That would be our position on that issue.

ARBITRATOR ROWLEY: So, the position--the best position from you is that the finding of unlawfulness reverts back to the date of passage, and the enforcement of the unlawful measure which would constitute a breach goes back to the date it was first enforced?

MR. DOUGLAS: Yes.

ARBITRATOR ROWLEY: And, at latest, that is 2009?

MR. DOUGLAS: Yes. It's the obligation in the words "No party may enforce" did not reset just because the very same measure, was challenged in the Mobil and Murphy Arbitration, was found to be a breach.

The liability finding in the Mobil and Murphy Arbitration should not have any relevance to the running of the limitation period in this case. The Claimant first acquired the alleged breach and damages flowing from it when they started their first claim. Canada did not acquire some new obligation under Article 1106 not to enforce because of the Tribunal's Decision. That's absolutely not the case. Relying on the Decision suggests that the Board somehow only started to enforce the Guidelines after the Decision, but that's not true. They did that in 2004.

You can't turn something you're already doing into something brand new. The breach is the same. The Decision does nothing to change that.

So, to put it another way, the fact of the Mobil and Murphy Tribunal’s Decision doesn't put

Canada in breach. It was the promulgation of the Guidelines in 2004.

Calling something a separate breach here is trying to put a different name on a continuing breach. The breach at issue in this case is the same breach both before and after the Decision on liability. The enforcement of the Guidelines pre-decision, as I mentioned, is the same as the enforcement post-Decision. Nothing has changed. Allowing the Claimant's claim to proceed on the basis of this claim, if it is about a separate breach, would effectively do away with the limitation period altogether.

If we accept the Decision finding that the Guidelines breach 1106, then Canada has been in breach since 2004. The Tribunal's Decision is not a measure that can be a breach under Section A. In this case, the obligation not to enforce the Guidelines is not dependent on a tribunal's decision. You must look at the terms of the Treaty, and a Tribunal's Decision doesn't affect that interpretation, and there is nothing in Article 1106

that would suggest that, if you don't stop enforcing, the breach there is a new and separate breach.

PRESIDENT GREENWOOD: Mr. Douglas, let me try a slightly different tact.

Sometimes, there is legislation on the statute books that is not enforced. It might be that it's never been enforced or it might be that enforcement has ceased. For example, there were a number of States in the southern USA that had statutes that prohibited interracial marriage. Now, in many cases, those statutes remained on the statute book years after Supreme Court Decisions made it clear that they were unenforceable. They were there because nobody ever got around to repealing them, for whatever reason.

Now, it's clear that, in those circumstance, there may have been the imposition of the Measure but there is no contemporary enforcement of it. You might have a situation where a Measure is enacted, but, for whatever reasons, the Government decides not to enforce it yet.

Now, just bear with me about the situation in

this particular case. The Measure was adopted, it was imposed in 2004. It was not actually enforced until 2009 after the Canadian court challenge had come to an end. But, when it was enforced, it was enforced with retrospective effect; yes?

MR. DOUGLAS: Correct.

PRESIDENT GREENWOOD: Now, at what point in your view, in your submission, does the limitation period in Article 1116(2) start to run? Is it that the claim must be brought within three years of the 5th of February 2004, or is that the claims be brought within three years--or I can't remember the exact date, but whatever the day it is--

MR. DOUGLAS: February 2009.

PRESIDENT GREENWOOD: 2nd of February 2009, whatever it happens to be.

MR. DOUGLAS: Excuse me.

(Pause.)

MR. DOUGLAS: It may be a fact-dependent question. There is case law in the NAFTA--I believe Apotex--whereby the Tribunals refused to allow the tolling of a limitation period pending court

decisions. If you read--and I believe it's an exhibit--if you read the exchange between lawyers from the Board to the Project Owners at the time where they agreed not to enforce, the language is quite strong that they will be under an obligation, and one could interpret that to mean that the Claimant on that date acquired the requisite knowledge in order to start the limitation period running.

It's precisely for this reason why the Claimant filed its claim on November 1st, 2007, before the domestic court cases had been completed.

PRESIDENT GREENWOOD: We would all do that, wouldn't we? The first rule of limitation periods, if you're a litigating lawyer, is always play safe because the effect of getting it wrong is catastrophic. It's also well-known to be the one thing we can guarantee that you will be sued for malpractice because prudent causation is so straightforward. But that doesn't mean to say that the point of view of the lawyer advising whether it's a good idea to claim now would be the same as the

point of view of the Tribunal faced with a claim brought later, deciding whether or not to apply 1116(1).

I know this isn't the particular problem we are looking at here--but I think it is an attempt-- like the questions I asked this morning--to try and extrapolate what 1116 actually means.

MR. DOUGLAS: From the standpoint, it all turns on the Claimant's knowledge: Knowledge of the alleged breach and knowledge of loss. I cannot provide an opinion, based on the evidence, off the top of my head, of whether or not they would have acquired that knowledge in 2004.

PRESIDENT GREENWOOD: You read the correspondence?

MR. DOUGLAS: Mm-hmm.

PRESIDENT GREENWOOD: How could you acquire knowledge of the breach--the breach being enforcement--until enforcement takes place?

MR. DOUGLAS: Well, the breach could be the imposition.

PRESIDENT GREENWOOD: Yes, but there are two

separate provisions in Article 1106, aren't there? "No party may impose or enforce." That means imposing the Measure is a breach, although, of course, on its own, it won't be a breach that will get you anywhere, but you won't suffer any loss or damage from it. It's enforcement that causes loss and damage. That might be true. There might be a circumstance in which the mere imposition of the Measure might cause a diminution in the value of the investment. That's a very different case from the one we're looking at here.

MR. DOUGLAS: Or the mere imposition might satisfy the knowledge of Article 1116.

PRESIDENT GREENWOOD: How can knowing that the Measure has been imposed give you knowledge that the Measure is enforced when it's not yet being enforced?

MR. DOUGLAS: Well, the case law under knowledge of loss does not require actual loss. It only requires the fact of loss, so I guess you would have a consideration there about whether or not the mere imposition would create knowledge of the fact of

loss while the court case is pending.

PRESIDENT GREENWOOD: I would have thought that you cannot know the fact of loss until there has been loss.

The situation you would be in, if you challenged the 2004 Guidelines before the Canadian courts, is you know that there has been the imposition in breach of Article 1106. You know that, if you lose, the Measures will be enforced. You know that if you lose and the Measures are enforced, you will suffer damage, but knowing that something will happen if something else happens, is that the same as first acquiring knowledge--I don't want to pick the wrong Article--just turn up 1116.

Is knowing that something will happen if something else occurs the same thing as having knowledge that that thing has happened, the knowledge that you have suffered loss or damage?

MR. DOUGLAS: Mm-hmm.

PRESIDENT GREENWOOD: Because Article 1116(2) requires knowledge that the investor has incurred loss or damage, not knowledge that it will incur loss

or damage, if certain things happen.

MR. DOUGLAS: Should we turn--at least in the context of the court decisions in this case, from our position, we don't see how they're relevant because, even if it's 2009, the current claim in 2015. So, if you want to explore our position on the meaning of these terms, I'm happy to turn to that part--

PRESIDENT GREENWOOD: That's what I'm exploring. I'm not exploring--the court cases are in the past, and they don't affect the issues before us now. But they are, nevertheless, important in terms of trying to establish quite what Article 1116 requires.

Now, you are relying on Apotex for additional reading?

MR. DOUGLAS: Why don't we can come back to the horse race, if I could.

PRESIDENT GREENWOOD: Mr. Rowley's the expert on this, not me.

MR. DOUGLAS: Mr. Rowley, if I understood your horse analogy correctly, until you race a horse, you won't know whether you will win or lose and have

to pay; correct?

ARBITRATOR ROWLEY: Yes.

MR. DOUGLAS: In this analogy, the question of whether there is a fact of damage depends on running the race.

I don't mean to cross-examine you here.

ARBITRATOR ROWLEY: It depends on running and winning.

MR. DOUGLAS: And winning, yes.

We would posit that, on the date the Guidelines were enacted, the race began, and the fact of damages was known as of that date. When the Guidelines were enacted, the race began, and Mobil was winning. The oil was producing. They incurred obligations.

ARBITRATOR ROWLEY: I think what you need to deal with is that Claimants' position that things change over the life of a project. One of the things that might have changed was that a new government might have come in and changed the Measure or taken it away. And so, if there had been actual damage for the first five years of the Measure, and the Measure

was the last 30 years, and 5 years out from then the Measure stopped being enforced, you would not be able to know that, 15 years on, the fact that there might have been a loss, actually had been incurred--whether that loss had been incurred. That's what I think I was getting at.

MR. DOUGLAS: Well, perhaps, we could draw an analogy here, which I think is quite applicable to the Grand River Decision. In Grand River, there was a Master Settlement Agreement that required paying into escrow every April in every year for the next 25 years.

The Claimant in that case, Grand River, argued that they only know the knowledge of their loss in every year that they pay, and that there is a subsequent limitation period in every single year that goes on into the future, and the Tribunal rejected this argument, and this is the seminal decision referred to by the NAFTA Parties on the meaning of "loss" or "incurred," under 1116(2). The Tribunal said: "When you become subject to the obligation to pay for the next 25 years, that is to

incur loss or damage. Actual payment is not necessary."

ARBITRATOR ROWLEY: Was the amount of payment in that case known, that was to be made every year?

MR. DOUGLAS: I don't think the amount would be known for the next 25 years. I could look into that, but...

ARBITRATOR ROWLEY: You're saying you don't know?

MR. DOUGLAS: I just answered I don't know. I would be happy to take a look.

But let's look at what the Claimants say about their own fact of knowledge because, Mr. Rowley, it cannot be in doubt that in the first arbitration the Claimant unequivocally argued that it did know these losses and it had incurred them and did claim them. So, I struggle to see how they can have a different knowledge under 1116(2) now to say that somehow there is now some ambiguity that restarts the limitation period anew when there is an obligation to pay.

In an argument that they should be awarded

their spending surplus, Mr. Phelan has a heading at Page 9 of his Second Witness Statement stating, "The Guidelines require spending over the life of the field." And, at Paragraphs 32 to 33, he explains--and Mr. O'Gorman mentioned this in his Opening remarks as well. "The obligation under the Guidelines is based on total recoverable oil. It's the formula. It's not based on an annual assessment. It's a global requirement that the Board monitors on an annual basis. It's the obligation under the Guidelines is one for the life of the Projects. It is not one that comes about every year."

Mr. Phelan, of course, also testified that the Projects are bound by Canadian law to comply with the Guidelines. There really isn't a doubt they will continue on into the future. From Canada's perspective, when you look at knowledge of loss under Article 1116(2), you have to look at the fact of loss, not the quantum, and this distinction was made by the Ansung Tribunal recently.

The fact that the Claimant will incur loss over the life of the Project surely cannot be in

doubt. There may be challenges with respect to how that quantum is determined, but that is not the question for knowledge of loss under 1116(2). The question there is the fact. And the Claimant has repeated--except for today--repeated time and time again that the fact they will suffer loss for duration of the Projects cannot be in doubt.

To me, this crystallizes the necessary knowledge under Article 1116(2). The Claimant cannot have it both ways. It cannot stand up in front of one Tribunal and says that it has all the knowledge and incurred all the loss and make all the claims, and show up in front of another tribunal and say that it doesn't have any knowledge at all. Claimant has changed its position in this regard. From Canada's perspective, that cannot be ignored.

And, in our Opening slides, we had included some specific statements--maybe you could turn up Slide 73.

On the left, you will see remarks made--these are just two examples.

ARBITRATOR ROWLEY: Tell us what the slide

is, for the record.

MR. DOUGLAS: Oh, my apologies. Thank you, Mr. Rowley. It's Slide 73 from Canada's Opening Presentation.

These are two examples--and Canada would be happy to find more--where the Claimant not only acknowledges loss, not only acknowledges knowledge of loss and knowledge of breach, but admits that the limitation period has started to run because of that knowledge. How can the Claimant admit that the limitation period started to run in the Mobil and Murphy Arbitration, but that there's a new limitation period that starts to run now?

The Claimant states: "For limitation purposes, time starts to run because a loss is incurred from the date on which the relevant act or measure takes effect." And we can have a debate about whether that was 2004 or 2009. It doesn't matter. In this context, either date, the Claimant is time-barred, and the matter is closed.

Those are my submissions. We can turn to res judicata, unless the Tribunal has any further

questions.

PRESIDENT GREENWOOD: I have no further questions.

What about my colleagues?

ARBITRATOR GRIFFITH: I think you've probably had enough questions from us. Let's proceed.

MR. DOUGLAS: Thank you very much, Dr. Griffith, Mr. Rowley.

PRESIDENT GREENWOOD: I suggest we take the coffee break, if that's convenient to everybody, because it's a natural dividing point in the argument.

Mr. Douglas, thank you very much. I know we have given you a hard time.

MR. DOUGLAS: No, no, honestly it's an honor to appear in front of all three of you.

PRESIDENT GREENWOOD: That's half the pleasure of being Members of the Tribunal. We can give a hard time to counsel on both sides.

MR. DOUGLAS: Yes. Yes. Absolutely. No problem.

PRESIDENT GREENWOOD: I suggest--when I've

said 15 minutes in every previous occasion, we have always had difficulty actually getting coffee in 15 minutes. Shall we come back at 20 past? That will give us a little bit longer. That is 15 minutes. We will come back at 25 minutes past. That will give you a chance for a little breather.

(Brief recess.)

PRESIDENT GREENWOOD: Right. Thank you, ladies and gentlemen.

Welcome back, Mr. Luz.

Before you start, I noticed that Mr. Douglas has retreated as far from the microphone as possible.

Could one or other of you just help me? It's a trivial point and I can find the answer in the papers but it will take me a long time. Which of the Apotex Awards or Decisions was Mr. Douglas relying on? I think there are three, aren't there?

MR. LUZ: I'm going off memory. There are two, although one had two Claimants, I believe--I often get confused--

PRESIDENT GREENWOOD: Perhaps you could take it under advisement. If you don't have the answer

now, perhaps just have a look and see because it was an off-the-cuff response to a question, not something with a slide, and I just to want make sure I look up the right reference and that I properly understood what Mr. Douglas' point was.

MR. DOUGLAS: It's Respondent Authority Number 5.

PRESIDENT GREENWOOD: RL-5.

MR. DOUGLAS: RL-5. Now, I'm retreating.

(Laughter.)

PRESIDENT GREENWOOD: Yes, thank you, Mr. Luz.

MR. LUZ: Thank you, Mr. President and Members of the Tribunal.

My Closing Arguments, obviously, are going to focus on the next main topic, which is res judicata.

I don't want to spend really much time going through the Decision again as we did on Monday. It was a highly enjoyable experience, and I know the Tribunal will probably be sick of reading the text, as everyone in the room is, but the main purpose of my presentation will be in particular to the request

of you, Mr. President, but I did not get the opportunity on Monday to go through res judicata in international law, because there has been quite a bit of discussion with respect to the impact between cause-of-action estoppel and issue estoppel and so on and so forth. So, I plan to spend most of my time on that, and then bring it all right back down to the Decision that this Tribunal needs to make with respect to the Mobil/Murphy Decision. And, in our respectful submission is that there is only really one option, and that's to dismiss it on the basis of res judicata.

I do have a couple of specific points that I will make with respect to what the Claimants mentioned this morning; and, if there are any questions that I didn't get to, I hope and expect that the Tribunal will point those out.

So, the premise of Canada's argument with respect to res judicata is that, it precludes the re-litigation of claims; and, as I said in my Opening Statement on Monday, the principle of ne bis in idem is a basic principle of international law and is a

defensive one that prevents a Claimant from bringing exactly the same claim again and seeking further relief. I think, obviously, the Nicaragua and Colombia Delimitation Decision of the International Court of Justice is of great interest. But I'm going to start back even further and try and draw this line that goes starting right up in 1871 and bring it right up to the present time to show the point that Canada has been making that, that cause-of-action estoppel is recognized in international law.

I will first start off with the Machado arbitration, and that came out of the Spain-U.S. Claims Commission, and that involved a claimant that was seeking damages for the embargo of a house in Cuba, and that claim was filed in 1871, but it wasn't ultimately pursued by the Claimant. That was Claim Number 3.

Six years later, in 1879, the same Claimant brought another claim, called Claim Number 129, with respect to the same property, but this time the Claimant wanted rent and damages for the seizure of the property. The Tribunal said no, you can't do

that. And, as you can see from the slide, the test is whether both claims are founded on the same injury, that the only injury on which Claim Number 129 is founded is the seizure of a certain house, that this same injury as alleged was one of the foundations for Claim Number 3; and that, in consequence, Claim Number 129, as being part of an old claim, cannot be presented as a new claim under a new number.

So, in other words, even though damages were initially sought for a specific time period, the subsequent attempt by the Claimant to get damages for a more wholesome or accurate loss was barred as a matter of law because the cause of action was the same.

We go on to the Delgado Case, also from the U.S.-Spain Claims Commission.

Yes?

PRESIDENT GREENWOOD: Just clarify something for me, please. With Machado, there was therefore no prior judgment at all.

MR. LUZ: There was no prior judgment.

PRESIDENT GREENWOOD: So, it's not really a res judicata matter. It's a cause-of-action estoppel.

MR. LUZ: Well, it was dismissed for want of prosecution. So the point is that there was not a--the Claimant did not pursue it, and it was stricken from the docket. So, there was never a finding or a decision on the merit or on the specific question of quantum; there just wasn't. And yet, it was still barred from being re-litigated again.

PRESIDENT GREENWOOD: Is it your position that that still reflects international law? This case is about 120 years old, isn't it?

MR. LUZ: It is, but, as I said, I'm starting from the beginning and drawing a line right through--

PRESIDENT GREENWOOD: No, I want to know whether you're saying this-- Delgado reflects international law as it today.

MR. LUZ: It has been cited in numerous legal opinions and texts as an authority, as one of the seminal cases for cause-of-action estoppel, that the idea of the triple identity test being fulfilled is

one that is recognized in international law. As I said, it will start off from that place and end up at the ICJ in the Nicaragua Case.

PRESIDENT GREENWOOD: Okay. Thank you.

MR. LUZ: So, the Delgado Tribunal did the same thing, and you can see from the slide that, in the first claim, the papers on a record did not furnish a sufficient basis of estimate to make a fair evaluation of the Claimant's property at the time it was seized, and as long as satisfactory evidence on this point is not furnished to the Umpire, he must abstain from answering the second question which was put to him by the commission, which was the question of damages, quantum of damages.

So, the Umpire made no decision on the quantum of damages. He decided to abstain.

A few years later, the Delgado claimant came back in Claim Number 125 with more evidence. They also tried to argue that no, it's not the same claim, but the Tribunal said no. The underlying injury was the same as the first one, and that which is what the Claimant had failed to prove the first time.

Can you move to the next slide, please.

The Umpire said: "The Umpire is of the opinion that the question of whether this claim, Number 125, is a new one or the same one as Number 12 depends on whether new rights are asserted in this claim."

And it goes on to point out: "That now it's contended, although the injury complained of in the present case is the same seizure of the same property, the Claimant's right to recover indemnity on account of the seizure ought to be examined again by the Commission, inasmuch as the Claimant only asked in the former case for rents, issues, profits and income of the land, and that in this case he demands the value of the lands, but this conclusion cannot be accepted."

And the point was, in the first Delgado arbitration, even though the Claimant had just not provided sufficient evidence to prove his damage, and besides--and despite the fact that no finding on damages was made, the second Tribunal still considered this to be res judicata and dismissed the

claim.

And Bin Cheng in his book General Principles of Law, which I think is well-known to all, pointed out to the Delgado and Machado arbitrations as standing for the proposition that the whole question is regarded as settled and it may not be subject of a second claim.

Just to move forward a little bit further into the Orinoco Tribunal or the French-Venezuela Mixed Claims Commission 1905, they recognized the difference between what happens when there is an issue in--when the causes of action are exactly the same and then a separate case when the causes of action are not the same but the issue has been decided. So, Orinoco had said, and stood for the proposition: "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand, or claim, having passed

into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever."

The Tribunal went on, in the next paragraph, to distinguish a different situation, as they wrote: "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

And so, there is the recognition in the Orinoco Tribunal's view, is that there is a difference between when you have the exact same cause of action and another situation, issue estoppel, the cause of action may not be the same, but an issue may be different.

So skip forward a little bit because, quite frankly, it is not often that you have a situation before a tribunal like this one where the Claimant has admitted that they are seeking precisely the same relief for exactly the same cause of action. So,

it's not something that comes up very often because it is axiomatic in international law that this is not permitted. But it is something that is found in rulings of judicial bodies. And if we go to the WTO in a case before the Appellate Body, this was one of the cases in the EC-India Cotton Textiles Case.

ARBITRATOR GRIFFITH: Do we have a date for that?

MR. LUZ: Yes. The exhibit is R-80, and it was in 2003, so I'm skipping ahead a little bit further.

But it starts in 1998, when India challenged the anti-dumping duties on the imports of bed linens by the European Commission as inconsistent with the WTO Anti-Dumping Agreement.

So, among other arguments, India made an argument that there were other factors that Europe failed to investigate, other factors which might have caused injury, to the domestic injury. The original panel said that India failed to present a prima facie case, they didn't make any arguments on it and just left it at that.

In the subsequent proceeding, India tried again with the other factors claim. Europe, however, said, No, you can't do this. It's dismissal on the basis that--on the basis of res judicata. The WTO Appellate Body agreed. In 2003, it ruled that India could not come back and make the same claim again. And it said at Paragraph 93: "In our view, an unappealed finding including in a panel report that is adopted by the DSB must be treated as a final resolution to the dispute between the Parties in respect of the particular claim and the specific component of a measure that is the subject of the claim." And they said that, even though there was no decision or investigation on the evidence or anything else in the original panel report. It was just simply not--there was no prima facie case.

PRESIDENT GREENWOOD: You made the point I was going to raise. If you go to Slide 39, "having rejected India's position in that regard, we consider that India has failed to present a prima facie case in this regard." I have to confess, this is not an authority I have read yet--I've got to go back and

look at this one--but what they seem to be saying is India put forward a particular head of claim. It advanced only one argument in support of that claim, which we rejected, and, therefore, we consider India has failed to present a prima facie case.

Well, to say that you haven't presented a prima facie case is surely the same--that is a rejection on the merits, is it not?

MR. LUZ: Well, I believe the finding with respect to the consideration of dumped imports was actually in relation to something else. So, the failure to make a prima facie case stood on its own.

But I think the principle still applies, is the fact that it was not fully investigated, there is no specific decision. The point that the Appellate Body made--and they looked to this--was that the original panel had said that there was no prima facie case and that the effect of that--excuse me. The fact that there was no investigation on the merits does not make a difference if there was a no finding on prima facie case. The claim cannot go forward.

Their point was--and it says at

Paragraph 96--a complainant that, in an original proceeding, fails to establish a prima facie case, should not be given a second chance. Once the finding is adopted, it's considered to be a final resolution to the issue between the Parties with respect to the particular claim and the specific aspects of the Measure that are the subject of the claim.

PRESIDENT GREENWOOD: I'm not terribly clear about the procedure of the WTO, but a prima facie test is usually something you apply at a preliminary stage, either a preliminary phase of the proceedings or a preliminary stage in your reasoning, and this looks like saying you would, first of all, have to establish a prima facie case in order to get the matter considered. If you do not, you're chucked out in limine. If you do, you go to through to full consideration, in which case you may be chucked out on the merits.

MR. LUZ: Right.

PRESIDENT GREENWOOD: But that's rather different from what we have here, isn't it?

MR. LUZ: The point is that the WTO Appellate Body in many of the other cases relied on the fact that it was the same claim and that it cannot be re-litigated again.

If I can demonstrate by going--skipping forward a little bit to the fact that there is the recognition of res judicata in international law that it operates in this way, in the Spence v. Costa Rica Case, which is fairly recently, and the Tribunal has heard about this case with respect to the time bar. In that case, the Tribunal had decided that certain claims were outside of its jurisdiction because of the limitations period, but that certain claims were within them. And certain claimants in that case decided they were going to discontinue the claim.

Now, in response, Costa Rica asked the Tribunal to order that the claims be dismissed without prejudice--sorry, with prejudice because, as they argued, if the Claimant were to order--if they did not do that, there would be nothing to preclude the Claimant from coming back and initiating in the future the same or similar case against the

Respondent.

The Tribunal said that wasn't necessary to do. And what they said was that the doctrine of res judicata would preclude the same Claimants from submitting the same claims to a different CAFTA Tribunal in a subsequent arbitration. The Tribunal considers that any issue over the reopening of the claims in question would be appropriately addressed by reference to this doctrine.

So, again, even though there were claims within the jurisdiction of the Tribunal and they never ruled on it in the merits, it was still considered that res judicata would prevent them from resubmitting the exact same claim again in the future; and, therefore, the Tribunal felt there wasn't a need to dismiss it with prejudice.

So, this brings me to the Nicaragua WTO case. Before I get to that, though, the point of these cases and the case law--and we've cited other cases in the slides and so on--and I will skip ahead in a moment--but there is authority in international law for the proposition that if--if the triple- identity

test is followed, and there is--it is the same claim, and there is no dispute between the Parties, as Claimant has already pointed out, it is seeking precisely the same relief for identical causes of action. That is where cause-of-action estoppel in res judicata applies.

Now, again, I said I would start the line way back and bring it right up to the WTO--to the International Court of Justice Nicaragua Case. Now, I'm not going to, obviously, spend too much time discussing it. We had a little bit of discussion this morning, but I just want to say that, this is one of those rare occasions when, as an advocate, you can point to both a majority and a dissenting opinion and say that both of them are actually good for your case. That is the position that Canada takes. It's actually a perfect example of why this claim should be barred by res judicata, and I will explain why.

If we could just move ahead to slide--to Paragraph 74 of the judgment.

Now, as the Tribunal knows--this is just--some of this is just the restatement of res

judicata in the jurisprudence of the Court. Now, this was what the problem was before the Court, was to interpret back to the 2012 judgment as to whether or not it was a straightforward dismissal of--

ARBITRATOR ROWLEY: What Slide Number?

MR. LUZ: Slide 49. I apologize.

So, the issue before the Court was whether or not this was a straightforward dismissal of Nicaragua's request for lack of evidence, as Colombia claimed, or a refusal to rule on the request because a procedural and institutional requirement had not been fulfilled, as Nicaragua argued.

Now, what the Court found was that, in its 2012 Judgment, Nicaragua's claim could not be upheld because it had yet to fulfill a legal obligation under Article 76(8) of the UN Convention on the Law of the Sea. And that legal requirement was to deposit information with the Continental Shelf--the Committee on the Delimitation of the Continental Shelf of the United Nations; the requirement that it had to do to submit that information on the limits of its continental shelf beyond 200 nautical miles.

Now, that's a key point. Article 76(8) of the UN Convention on the Law of the Sea requires--it's a prerequisite for all member states of UNCLOS, which included Nicaragua. It was an obligation that it had to fulfill. It was essentially a condition precedent. And this was the conclusion of the Court: That the reason why the issue had not been decided in the 2012 Judgment was because there was an--as you can see here, this found that the delimitation of the Continental Shelf beyond 200 nautical miles from the Nicaraguan coast was conditional on the submission by Nicaragua of information on the limits of its Shelf, provided for Paragraph 8 of Article 76 of the UNCLOS, to CLS.

Thus, the Court did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so. Now, in that case, res judicata did not apply here because there was this--essentially it was a--I mean, it's not an Arbitration Clause, but it was a legal prerequisite binding on all members of UNCLOS to perform before that could be done.

Now, obviously, there was a split in the Court with respect to the finding, and if we go to the Joint Dissenting Opinion, which we say--and I will bring it all together as to why both of these decisions favor Canada.

In the Dissent's view, it believed that they had, that Nicaragua had failed to adduce the evidence to prove it, and in that case, the matter is solved. It's res judicata.

The claim said--the Dissenting Opinion pointed out that, because they had failed to adduce sufficient evidence during the first proceeding, the Dissent had a real problem with the fact that they came back for the same claim, on the same grounds, against the same Party.

They also pointed out that if there had been--since they had examined it on the merits, they were bound to dispose of it on the merits.

And we can move ahead to what their point was ultimately. Go up one more slide, to paragraph--Slide 55. Yes.

Ne bis in idem, which is the term that I had

used at the very beginning of this week's presentation--this is one of those examples where that line, all the way going back from Machado, comes all the way over here. Because, as the minority said, even if one were to accept the Majority's interpretation of the 2012 Judgment, Nicaragua should not now be able to come back before the Court for a second time to attempt to remedy the procedural flaw which supposedly precluded the Court from delimitating the allegedly overlapping Continental Shelf entitlement in 2012.

And in Paragraph 60 it points out: "The principle of ne bis in idem operates, like res judicata, to protect from the effects of a repeat litigation. One cannot knock at the Court's door a second time with regard to the claim already examined by the Court on its merits." That is the principle that Canada is arguing for today.

The difference, obviously, between the minority and the majority does not apply here. For the majority, there was a legal prerequisite that had to be fulfilled; it was a condition precedent.

Therefore, they weren't able to find that the claim was properly before the Court the first time. The minority disagreed with that, but that's neither here nor there for the purposes of this case.

The point is, there were no legal prerequisites here that remained unfulfilled for the Claim to go ahead. Here, the principle of ne bis in idem applies whole stop.

I can also point out that the Dissent also pointed out another principle that arises in international law, the exhaustion of treaty processes; as a general principle, that once the mechanism by which a treaty is afforded a claimant the opportunity or the claimant or respondent a particular remedy, once that's exhausted, that's it: You can't come back and re-litigate exactly the same claim again. It has been prosecuted to judgment.

Now, obviously, I'm not going to spend any time discussing, Mr. President's Separate Opinion in that decision. Obviously it's of great significance.

(Comment off microphone.)

MR. LUZ: Well, I beg to differ. And,

obviously, this is first time opportunity for ever having pled in front of someone who has actually written an International Court of Justice decision.

But the point was--and this is where I'm taking this, because I want to bring it all back from the Nicaragua Judgment to our case--is that in that case, the International Court of Justice found that the legal prerequisite under UNCLOS had not been satisfied; therefore, no determination on the boundary could be made. Here, the Mobil/Murphy Tribunal found all the legal prerequisites were satisfied; there was positive finding on jurisdiction and admissibility. And I'm going to come to that again later.

The next point: According to the Majority, or according to the Judgment, there was no determination as to the legal standards that would be necessary to succeed on the merits. That is absolutely not, the opposite of what happened here. The Mobil/Murphy Tribunal determined what the legal standards were for the quantification of its damages.

The next point: In the view of the--in the

view of the Majority, the Court did not evaluate the evidence presented on delineating the boundary. Again, it's the complete opposite with respect to the Mobil/Murphy Tribunal. They evaluated the evidence presented for the quantification of future damages, whether that quantification met the standard of reasonable certainty. It was an examination on the merits.

So, again, there were no legal prerequisites that were--remained unfulfilled in the Mobil/Murphy case. There is a legal prerequisite--and we had a long discussion about this morning, so I hope that Canada's arguments on this are exhausted. But the one point that we can make further is that the legal prerequisite in the NAFTA is that a loss has to be incurred arising out of the breach.

In determining--in examining this issue, the Mobil/Murphy Tribunal decided that the claim was within its jurisdiction and admissible--the entire claim, for future years. The legal prerequisite to make the claim was satisfied. That finding carries issue-estoppel effect, and is not open to this

Tribunal to reopen. It has been found--the claim, the entire claim, was before the previous Tribunal. It was within its jurisdiction, and it was admissible.

Now, that is something that cannot be reopened. The Claimant has really tried to reinvent a finding that is, on its face, evident from its face, the Claimant has tried to say that suddenly Paragraph 429, and the dispositif at Paragraph 490, doesn't mean what it says. It does say it. The explicit text says the claim is within its jurisdiction and is admissible. It was squarely at issue, put at issue by Canada in the case. It was contested by the Claimants, Canada lost, the Tribunal ruled on it. That is it. It is res judicata, and it is not open for this Tribunal or the Claimant to try to reinvent the wheel.

Furthermore, it's important to point out that the legal--with respect to their claim for future damages, there is nothing about that that was a legal barrier to admissibility. The Tribunal looked at the evidence, evaluated it, and found that it didn't

reach the reasonable-certainty standard.

Now, the Claimant has made--

PRESIDENT GREENWOOD: That's not quite true, is it?

MR. LUZ: I'm sorry.

PRESIDENT GREENWOOD: Because they said that they highlighted certain problems with the evidence. They also said that wasn't relevant.

MR. LUZ: I'm sorry? Oh, it's certainly not ripe, is that what you said?

ARBITRATOR ROWLEY: It's irrelevant.

PRESIDENT GREENWOOD: No, it's a bit more than that.

"Ultimately"--Paragraph 478--"Although, ultimately, it is not strictly relevant, given that we are not inclined to compensate for expenditures not paid or levied, i.e., required to be paid, we have also highlighted the uncertainty of the evidence presented on the amount of the Incremental Expenditures in this largely future period."

MR. LUZ: Right.

So, here is the key difference. That all

arose out of the Claimant's expenditures-based damages model. So, the call for payment, as viewed by the Mobil/Murphy Tribunal, that was a factual predicate to reach the standard of reasonable certainty within the confines of the expenditures-based damages model for quantification purposes. It's not a legal prerequisite for the entitlement of damages. That was already passed by 1116(1). The legal prerequisite for a claim--there has been incurred loss or damage--they seized jurisdiction and admissibility for the entire claim.

If they had picked a different model, the factual predicate would have been different. So, for example, if the Claimant had picked a model that demonstrated the diminution of value to its investment, then the factual predicate for that kind of a model to reach a standard of reasonable certainty would have been different; for example, the existence of a going concern. So, in that kind of damages scenario, a call for payment would not have been relevant.

So, the fact that the Tribunal said that

damages they are inclined to pay, or inclined to compensate, for actual damages does not exclude actual damage they had suffered to their investment. Actual damage could have included that, but that's not what they pled. That's not what they presented to the Tribunal. They chose to value their damages in a different way.

So, of course, within the strictures of the expenditures-based damages model that the Claimants put forward, well, that called for payment, and is strictly a factual predicate to that. It's not a legal requirement; simply the way they pled their case.

And the fact is--and, again--and we went through this on Monday, because they really hang, the Claimants hang their hat on the use of the word "ripe" --but that just demonstrates that it's clearly in evidence--I shouldn't say "clearly," it's not appropriate to say "clearly"--but in Canada's submission, it is very important to notice the context in which the word "ripe" is used. It's used three times, including to refer to damages that were

incurred in the past.

So, if "ripe" means "not inadmissible," as the Claimants seem to say, it's completely contradictory to their original finding and the use of the word elsewhere.

ARBITRATOR ROWLEY: You mean "not admissible"?

MR. LUZ: I'm sorry?

ARBITRATOR ROWLEY: You said "not inadmissible".

MR. LUZ: Yes. Thank you.

So, again, and as Canada had said, the use of the term "ripe" is a synonym for "unproven to reasonable certainty," or it's an evidentiary issue that the Tribunal was presented with, simply because this was the model that they had presented to the Tribunal.

ARBITRATOR ROWLEY: Help us with this: It's clear that the Tribunal was not prepared to deal with future damages; yes?

MR. LUZ: Yes.

ARBITRATOR ROWLEY: Now, it is also clear

that future damages was before the Tribunal.

MR. LUZ: Yes.

ARBITRATOR ROWLEY: So, what you have is the Tribunal declining to deal with an issue which you say it ought to have; yes?

MR. LUZ: Actually, that's not our position. Our position is they did deal with it. There was a decision: Claimants do not get their future damages. That is the decision.

ARBITRATOR ROWLEY: And so if we're not with you on that, if we come to the view that the Tribunal said: Well, yes, it's before us, but we don't think it's ripe. We think another tribunal can deal with it, and so we're not going to deal with--where are we then?

Yeah, it's basically the question: Is there res judicata where a Tribunal has a specific claim before it, ought to deal with it, declines to deal with it? Where are we then?

MR. LUZ: Exactly the same place we are now with Canada's argument: Res judicata. And I will explain this because, Mr. Rowley, I actually have a

section devoted precisely to this issue as to whether or not is it possible that a tribunal just decided not to decide, and I have--I hope it will answer this concern because I did try and address it during my opening with respect to the Vivendi situation, with the Annulment Committee sending it to a new tribunal because the First Tribunal had failed to exercise the jurisdiction that it had.

So, I think there is two ways to read the Decision, or there is only two possible things because the Claimant's argument that it was suddenly declared inadmissible is simply untenable. It's evident that it was admissible, and that issue is res judicata. This Tribunal cannot reopen that again.

So, what was the Decision? The first interpretation is set out right there. In our view, there is no basis at present to grant compensation for uncertain future damages, and we went through, and I won't repeat again, Canada's position, and we hope that the Tribunal will see it as it reads it, that this was a rejection on the basis of lack of evidence or failing to reach the standard of

reasonable certainty. And that is tantamount to a determination that you are not entitled to the damages that you request. That is the legal standard, because res judicata has substantive, not just procedural, impacts.

The fact that they decided--

PRESIDENT GREENWOOD: Mr. Luz, why did they then go on to deliver the sentence immediately following the one you just quoted?

MR. LUZ: I'm about to come to that, Mr. President.

But, first, I will say that this is the primary and most obvious decision because, as we know, when the Tribunal had the claim before it, both Parties put before the Tribunal all of the evidence that it thought at that time was the way to go.

And on the variables and the expenditure-based model that the Claimants put forward, the Tribunal examined the probative value, they examined the evidence. They examined the competing testimony of Sarah Emerson and Peter Davies on oil prices. They contested the evidence of

Professor Noreng and David Montgomery on research and development at oilfields. They heard Mr. Walck and Mr. Rosen talking about the quantification of the damages.

And, in the end, they failed to prove their claim for future damages. That has res judicata effect.

Now, we heard this week that, as Canada had argued consistently in the first arbitration, the Claimants could have done things differently, and we heard this week--sorry, I will move forward to the next slide here. This was something that Canada has said all along, starting right from Day 1, is that this was not something that the Claimants had--their quantification was just simply not going to satisfy the standard of reasonable certainty.

In fact, the Claimants did have a choice. We heard this week in cross-examination that they did consider other scenarios on how they could have quantified their damages.

They also testified--Mr. Phelan also testified this week to the question put to him:

Would it have been possible to use another model? Not what other model, a better one than the one that you actually used.

And the answer was yes, it would have been possible.

In Canada's view, this is just clear--this is further evidence of the fact that the Tribunal examined the legal standards--they had set the legal standard before an admissible claim, examined the evidence, and dismissed it for failure to carry their burden of proof.

Now, to come to the last sentence of Paragraph 478, as, Mr. President, you asked, what is the impact of that? In Canada's submission, it has no legal consequence. If this was the Decision, now--no damages now because of uncertainty but can come claim later. As we've heard, a criteria for issue estoppel--and Mr. President asked this question with respect to that last sentence. In Canada's view that sentence has no legal impact at all for this Tribunal. It's simply obiter, if anything.

A criteria for issue estoppel is that the

issue has to have been put distinctly before the Tribunal.

Now, there certainly was never any finding as to whether or not the Parties could come back--excuse me, there was never any finding that was put before the Mobil/Murphy Tribunal that the Parties could reappear over and over again. It was just something that was never at issue between the Parties. Neither Party wanted to reappear. The Claimants were asking for all of their future damages now because they knew they couldn't come back and didn't want to come back, and Canada's position was the same.

So, it was not a subject of dispute that was ever at issue between the Parties or put to the Tribunal, and that's evident from where that sentence is and the support that it cites to. None. You can see from paragraph--the last sentence, there is no analysis as it what part of NAFTA Chapter Eleven such Authority derives. There is no solicitation of the views from the disputing Parties or from the other NAFTA Parties. There is no consideration of whether NAFTA Chapter Eleven even allows this or a

consideration as to what the res judicata effect of its previous Decisions would have.

So, this sentence simply has no legal effect for this Tribunal. It's not even phrased in a directive. It's clearly not an order or a directive. It's not in the dispositif.

PRESIDENT GREENWOOD: I can see it's not an order or directive, and it certainly caused a great deal of expense and difficulty in these proceedings, but the President of the Mobil I Tribunal is the President of the Iran-U.S. Claims Tribunal. He's one of the most experienced arbitrators that there is. Let us leave Professor Sands out of the equation because he was in the minority, and Professor Janow is also a very experienced arbitrator. It's as clear as day that, if they ruled on the merits, then that would preclude future proceedings. Nobody questions that.

So, by saying that you can come back and bring a fresh claim, it's the significance of what that tells us about what they thought they were doing, and what they thought they were doing must be

relevant to what they were actually doing.

MR. LUZ: As I had said--and obviously this is not about the individual arbitrators but, rather, the powers of the Tribunal. When they had examined the evidence and determined that they were not entitled to the damages that they had claimed, that conclusion has res judicata effect. Well, that's the conclusion that they had reached: No damages.

PRESIDENT GREENWOOD: They certainly don't award damages. That's common ground--but the fact they don't award damages is not at all the same thing as saying that there is no entitlement to damages.

MR. LUZ: But the fact that the Claimant failed to carry its burden of proof in order to prove its damages--

PRESIDENT GREENWOOD: There is no finding that the Claimant failed to carry its burden of proof.

MR. LUZ: That, Canada would submit, is evident from the actual Decision.

PRESIDENT GREENWOOD: Well, "although ultimately it is not strictly relevant--given that we

are not inclined to compensate for expenditures not paid or levied--we have also highlighted the uncertainty of the evidence pertaining to the amount of Incremental Expenditures."

So, saying "we have highlighted the uncertainty of the evidence" doesn't seem to me, on the face of it, to be the same thing as a finding that there hasn't been a discharge of the burden of proof.

MR. LUZ: But the point of that paragraph is to be able to say that this stemmed entirely from the way that the Claimants had quantified its damages--the expenditures-based model. So, the fact that there was an admissible claim before them, if there was--and this actually segues to what Mr. Rowley was saying: Is there a question--that really was another way of saying there is a decision not to decide.

But, if we can move to the next slide--sorry, next one, to "Decision not to decide."

Sorry, I've skipped ahead.

Yes.

To contemplate that there was a decision not to decide is not tenable for this Tribunal because it would force this Tribunal to stand in judgment of the previous one for having failed to exercise its duty and responsibility under the Additional Facility Rules which governed the arbitration and having committed a reviewable error of law. Now, if I can go forward--

ARBITRATOR ROWLEY: I'm not with you there. There is a real issue before us on whether the Tribunal made a final decision on the issue of claim for future damages. We have jurisdiction over that, and we are inclined to exercise that jurisdiction and reach a decision. In reaching a decision, we have to comment on whether that Decision was made below. That's an assessment of whether--and if you say the question was properly before them and they ought to have decided, if we say they didn't decide, we're of necessity in exercising our jurisdiction having to comment. That can't be wrong to do that.

MR. LUZ: That, in our submission, puts this Tribunal into the position of having to stand in

judgment of the Tribunal. If we go to the ICSID Additional Facility Rules: "A tribunal is bound to decide on every question submitted to it, together with the reasons upon which the decision is based."

ARBITRATOR ROWLEY: I'm sorry, accepting that, what if they didn't? Are you saying, even though we have the jurisdiction to determine it, we mustn't? Because--

MR. LUZ: No.

ARBITRATOR ROWLEY: --just by quoting that Decision--that paragraph to us means we have to decide that--

MR. LUZ: Actually--

ARBITRATOR ROWLEY: --to decide the issue before us whether they decided, finally, the point.

MR. LUZ: It would have been--the way to remedy that is not for this Tribunal. It would have been through either Rule 57(1) of the ICSID Facility Rules, which is either Party may request through the Secretary-General to decide any question which it has omitted to decide in the Award. Or, alternatively, you could have gone--the Claimants could have gone to

Ontario Court for set-aside.

ARBITRATOR ROWLEY: They didn't do those things.

MR. LUZ: They did not.

ARBITRATOR ROWLEY: They came here.

MR. LUZ: They did.

ARBITRATOR ROWLEY: And we have jurisdiction over the question.

MR. LUZ: Our point is that once the--if there was--this is in the scenario there was a decision not to decide.

ARBITRATOR ROWLEY: And just accept that for the moment, that they actively decided not to decide the point at issue.

MR. LUZ: The claim is extinguished. That's what happens in that kind of event.

So, if the claim had not--if the Tribunal was bound to decide the issue, it had to make a decision, and it decided not to decide, and the Claimants didn't try and remedy that lack of decision, the claim is extinguished. That is the point of cause-of-action estoppel. You cannot come back and

bring the exact same claim again.

Now, if the Claimants had felt that there had been a failure to exercise the jurisdiction over its claim or admissibility or there was a problem, it was bound to remedy it that way. Just like in the Vivendi situation. When the First Tribunal failed to exercise its jurisdiction, the remedy was to go to the Annulment Committee. The Annulment Committee said, "Yes, you failed to exercise your jurisdiction. Go back to a new tribunal and take care of it." That didn't happen here. Now...

ARBITRATOR ROWLEY: Well, in that case, there was a failure to exercise jurisdiction, and so a new tribunal had the authority, had the jurisdiction, to take jurisdiction; yes?

MR. LUZ: I'm sorry?

ARBITRATOR ROWLEY: In the Vivendi Case you just referred to--

MR. LUZ: Yes.

ARBITRATOR ROWLEY: --the Tribunal I failed to exercise its jurisdiction.

MR. LUZ: Yes.

ARBITRATOR ROWLEY: There was no res judicata.

The next Tribunal that was put in place exercised it for them.

MR. LUZ: But that's because in the context of the ICSID framework, an Annulment Committee is able to send it back for reconsideration by a new tribunal.

Here, once the Mobil Murphy Tribunal was functus, the claim is extinguished: It is what it is. And our bottom line is that the Mobil/Murphy Tribunal ruled its entire claim--the entire Claimants' claim was before it, and it was admissible. That has issue-estoppel effect. That cannot be revisited by this tribunal no matter how the Claimant tries to re-create it.

PRESIDENT GREENWOOD: Well, in the Nicaragua-Colombia judgment, the Court says that it's not enough that there is identity of the parties, et cetera. There has to be a final determination, or "definitive settlement," is the phrase that's used elsewhere. Where in the Mobil I Decision is there a

final settlement of the issue of the claim for future damages for future loss?

MR. LUZ: We would say it's the paragraph--I used to have all the paragraphs memorized.

The Final Decision, it's at Paragraph 478. It appears right before, in Canada's view, the obiter statement: "In our view, there is no basis to grant at present compensation for uncertain future damages." That's the Decision. That extinguishes the claim.

PRESIDENT GREENWOOD: But you can't read that without reading the whole of the paragraph or to read it in context.

MR. LUZ: Indeed. And this has been the subject of the debate throughout the week, is to show that the reason why they got to that point was because of the way that the Claimants pled their damages case. They failed--they had other options, they didn't exercise those options. It put the Tribunal in a position where that was the way it was going to value the case. That was the risk it took. That was the Decision the Tribunal had to make.

There are no damages awarded. That is res judicata. That ends the matter.

So, this is--because--this is a decision on the merits. There is no other--because it's an admissible claim and it is within the jurisdiction, it has to be a ruling on the merits because there are no other legal categories for which one can call it.

ARBITRATOR GRIFFITH: Counsel, is it a fair summary to say your position is the Decision was not to decide it, that suffices here to establish res judicata?

MR. LUZ: Yes.

ARBITRATOR GRIFFITH: Thank you.

MR. LUZ: I would just like to conclude--

PRESIDENT GREENWOOD: Can I clarify that--

MR. LUZ: I'm sorry.

PRESIDENT GREENWOOD: --because it contradicts something that went up on the screen a little while back. You were reported as having said a few minutes ago this is not a case of a decision not to decide, and you just answered Dr. Griffith by saying this is a case of a decision not to decide and

it creates a res judicata.

MR. LUZ: Sorry, I apologize.

PRESIDENT GREENWOOD: That's all right. We just need to clarify which it is.

MR. LUZ: Yes.

PRESIDENT GREENWOOD: I realize this is extremely difficult.

MR. LUZ: Yes, and I don't want to--

PRESIDENT GREENWOOD: And let's be frank about it. Whatever else, the expression "the Award is"--"the decision is very clear" is one which is ringing less and less satisfactory--

MR. LUZ: Indeed.

(Overlapping speakers.)

PRESIDENT GREENWOOD: --whatever else it is, it isn't clear.

MR. LUZ: Indeed.

And that's why I tried and qualified the word of "clear," and I will come back to it because this is something that the expectations of the Parties were clear, and we got what we bargained for, which is a final decision that extinguished the claim.

ARBITRATOR ROWLEY: Just before you come back with me--

MR. LUZ: Yes.

ARBITRATOR ROWLEY: --let me tell you what I understood you to have said. I'm not putting words in your mouth. I understood you to have said very clearly there has been a decision on the merits.

MR. LUZ: Yes.

ARBITRATOR ROWLEY: And I took your answer to Dr. Griffith to be, but even if there wasn't, if it was a decision not to decide, that is the equivalent of a decision on the merits.

MR. LUZ: Thank you. That is exactly the position.

ARBITRATOR GRIFFITH: Counsel, can I just take it--

MR. LUZ: Yes.

ARBITRATOR GRIFFITH: --when you said the Parties got what they sought, well, it didn't really, we're back here years later trying to sort out what they did get?

MR. LUZ: I can end the presentation with

this, just to point out something that--with the last slide because, for the most part--and this may come as a bit of a shock to hear--for the most part, the arbitration worked the way it was supposed to, in general terms, a few wrinkles. Both Parties pled their cases. Both Parties put their best foot forward. Both Parties had excellent counsel. They had excellent Damages Experts. They had excellent witnesses. They put their case forward within the confines of NAFTA Chapter Eleven, because that's the confines that we operate in.

And this is what Canada had said, and just, I wanted to finish on this because it just shows that Canada has been the one that has been consistent throughout this whole process, with exceptions for litigation strategies, but this really does summarize what Canada's position has been all along. And this is from the Hearing, the Mobil/Murphy hearing: "It is Canada's view that Article 1135 of the NAFTA governs, and Article 1135 of the NAFTA provides for the issuance of the Final Award for monetary damages. Thus, in Canada's view, the only option available to

this Tribunal is to make a final award for monetary damages. Now, I note this isn't particularly helpful to the Tribunal. If the Tribunal does find a breach, it will look to damages. However, when it does, it is important to recall the legal implications of an award. It's first important to note that damages are the Claimant's responsibility. It's their burden, and damages must be reasonably certain."

In Canada's submission, that is what the Claimant failed to do. They put their case forward. They had a litigation strategy. It was what they decided to do. They must bear the consequences. Just as Canada cannot re-litigate on the basis of res judicata the finding on liability, as much as we would like to, the Claimants cannot now also be given a second chance. We both had that dispute, non bis in idem. This claim cannot go forward.

So, unless the Tribunal has any other questions...

PRESIDENT GREENWOOD: Mr. Luz, thank you very much. That's helpful.

I would like to take a 10-minute break

because there is a matter on which we would like to confer, and then we will come back and put a question to you.

While we are out of the room, perhaps counsel could just confer about whether you want to make an application for Post-Hearing Briefs just on these issues of res judicata and 1116 and 1117. I'm not interested at the moment in the position about damages. That will only become relevant, if it becomes relevant at all, after we have decided these two points. Okay, thank you.

Oh, yes, and there were some authorities this morning. You wanted to reserve your position about those.

MR. LUZ: We will. I don't think it's something that we will exercise, the President's offer on--

(Overlapping speakers.)

MR. LUZ: --but we will--

PRESIDENT GREENWOOD: And the other thing I want an answer to when we come back is I did ask you and you reserved your position this morning whether

that phrase "arising out of the breach," which appears in 1116(1), should also be read into 1116(2). I think it's fairly obvious it does have to be, but I would like your answer for the record.

MR. LUZ: We will do our best, but treaty-interpretation things we are very careful and deliberate to make sure that we are accurately representing Canada's--

PRESIDENT GREENWOOD: Of course. Of course.

MR. LUZ: --views and interpretations, so I hope you will beg our indulgence if we still have to reserve on that.

PRESIDENT GREENWOOD: Yes.

MR. LUZ: But I will discuss with my colleagues.

PRESIDENT GREENWOOD: Thank you.

MR. LUZ: Thank you.

(Brief recess.)

PRESIDENT GREENWOOD: Right, thank you, ladies and gentlemen.

Mr. Rowley has a question he wishes to put to both Parties.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR ROWLEY: I'm glad you have come closer, Mr. Douglas.

MR. DOUGLAS: Oh, no.

(Laughter.)

ARBITRATOR ROWLEY: It's not an uncomplicated question. Let me try it. It concerns the limitation period.

And, having listened to Canada's presentation this afternoon on limitation period--and I speak for myself only here--I've distilled it down to this, that the Guidelines or the measure that has been found to be unlawful by a tribunal that has jurisdiction to do so, the result of that is that Canada imposed--I'm using "imposed" in the language of 1106--an unlawful measure in 2004. And, leaving aside continuing breach for a minute, that means, in terms of a limitation period, that it must run in respect of imposition of an unlawful measure from 2004.

With respect to enforcement, Canada's position was that, while it was enforced from the

beginning, it was certainly enforced from 2009. And following the court decision--or the Tribunal Decision that it was unlawful, we know that an unlawful measure has been "enforced," again in the language of 1106, from at least 2009, again leaving aside the continuance of enforcement or the continuance of breach. That being the case, the limitation period, as regards enforcement, runs from 2009.

The next question I raised with myself was, is this affected by the requirement in 1116(2) for knowledge of loss or damage having been incurred, and the possible answer to that is, no, not if, at least in 2009, Claimant knew or ought to have known that it had incurred damage, was incurring damage at that time. The fact that it did not know how much that damage would be is not dispositive because of the case law on that point.

That is all the background to the real question that I need to put to the Parties in the hope that they will be able to help us.

If all of what I have just said would be a

conclusion that were reached by this Tribunal, it could be said that the claim before us was statute-barred. The question then arises: Has there been a new breach following the decision, by the Board, to continue to impose or enforce the Guidelines after the Decision of the earlier Tribunal? And, on that question, the issue arguably is this: There is an obligation in international law to perform a treaty, including NAFTA, in good faith, and can it not be said that a decision by the Board to continue to enforce the Guidelines after the Decision of the Mobil I Tribunal constitutes a breach of that obligation?

And that gives rise to a couple of questions:

Is the question of--well, first of all, is a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?

And, secondly, is an allegation of such a breach properly before us? For example, I don't recall it being pleaded as such, but can it be said to have been pleaded in the pleading that is before us on abuse of process?

So, that is my question--or questions. We've discussed them or I've made them known to my colleagues, and we thought we should give both Parties an opportunity to comment.

And, Mr. Douglas, you first.

PRESIDENT GREENWOOD: Before you get too anxious about that, I think it might actually be better, as it is now quarter to 4:00, to invite each party to file a short Post-Hearing Brief on this because I don't think these are questions--or I don't think this is a question that can easily be answered just off the cuff.

What I would, therefore, suggest is a short brief, shall we say not longer than ten pages, by close of play on Friday of next week from each party with a responsive brief from each party by close of play on the following Friday?

I see anxiety on the part of Canada's legal team.

Have you another hearing next week?

MR. DOUGLAS: I believe my colleague, Mr. Luz, has a hearing in two weeks, and I am looking

forward to some much-needed rest and vacation next week; at least, that is my schedule. If we could push it out a bit, we would appreciate that.

MR. O'GORMAN: We would not object to delaying it slightly, perhaps two weeks first and then the following week, if that would be acceptable.

PRESIDENT GREENWOOD: All right. Would that be manageable, two weeks from today for a Post-Hearing Brief and one week after that for a responsive brief?

MR. DOUGLAS: Could we do two weeks and two weeks to give us enough time to contemplate the Claimant's submission?

PRESIDENT GREENWOOD: One minute.

(Tribunal conferring.)

PRESIDENT GREENWOOD: All right. Two weeks and two weeks.

Let me just, for the avoidance of any doubt, I will just check my diary and make sure what the dates in question will be.

So, today is the 28th of July. That means that we would expect to have from you an initial

Post-Hearing Brief on the 11th of August, close of play, Washington, D.C. time, and a responsive brief by close of play on Friday the 1st of September.

MR. O'GORMAN: Can we defer to Ms. Gastrell as the calendaring expert?

PRESIDENT GREENWOOD: Sorry, what I thought I said was--oh, I beg your pardon, yes, I'm sorry. I'm not looking at the right page in the diary.

Okay, yes, the brief, the Post-Hearing Brief will be deposited by the 11th, and the responsive brief by the Friday the 25th of August, not Friday the 1st of September. My apologies for that. You're quite right.

And that should be not more than ten pages in each case, to respond to the question put by Mr. Rowley; and also, please, with that, in a separate document, we would like your short submissions on the question of costs.

Now, I realize this is very difficult to do because you don't know what the outcome of our deliberations is going to be. Neither do we, as yet, but the position about costs in ICSID is rather

complicated. There can only be one award in the ICSID system. So, if we find in Canada's favor on either of the two points, it's common ground that that puts an end to the case and, therefore, the document in which we would give that ruling will be an award. It will therefore have to deal with the question of costs. If, on the other hand, we find against Canada on both of these points, it would have to be on both of them, then the ruling will take the form of a decision. A decision cannot rule on costs. That would have to be saved for the Award, which would come in due course, but there will be nothing to stop us making an observation in the Decision about the costs of this particular round of the case.

So, it's precisely because we cannot at this stage say which way it is going to go and what form the ruling will take, never mind what the substance is of this, we can't say what form the ruling is going to take, that we would like your submissions on costs and billet costs now.

Mr. Rowley has made a very important point, which, of course, you got the costs of the

Post-Hearing Briefing.

The Post-Hearing Brief that is due on the 11th of August should just deal with Mr. Rowley's question. The responsive briefs, on the 25th of August, should just be responsive to the briefing of the 11th of August. And then, for the 1st of September, please give us a note of your costs and a brief--and I stress "brief"--submission on the question of costs.

There is also, Mr. Luz, the case you reserved your position on. Do you wish to say anything about that?

MR. LUZ: I don't think there is anything at this point we would add to it. Thank you.

PRESIDENT GREENWOOD: And my question to you about Article 1116(2), can I just remind you what it is?

Article 1116(1)--and the same thing happens with Article 1117--Article 1116(1) says: "An investor of a party may submit to arbitration under this section a claim that another party has breached an obligation," yes, "and that the investor has

incurred loss or damage by reason of or arising out of that breach."

Now, that last phrase, "by reason of or arising out of that breach," does not appear in 1116(2), which merely talks about knowledge that the investor has incurred loss or damage, but I can't make sense of it unless you read those words into 1116(2) by implication.

MR. LUZ: No, I understand the question. And if it's acceptable to the President, then we can address this. It is something because it's treaty interpretation; it's not something that I would like to answer right away, but we will respond to that.

PRESIDENT GREENWOOD: I think the Claimant doesn't need to say anything about it because you answered my question orally this morning.

Yes, fine, you can just put a brief statement to that effect in.

Good. Are there any other matters of housekeeping which either Party would like to raise?

MR. O'GORMAN: None from the Claimant.

Thank you very much, Mr. President. We are

very grateful for your wonderful attention and questions during the course of this week. It has been a real pleasure being with all three of you.

PRESIDENT GREENWOOD: Thank you.

Mr. Luz? Mr. Douglas?

MR. DOUGLAS: Yes, just one housekeeping matter if the matter does turn to damages. Canada just wanted to put a marker down now about the very limited cross-examination of both Canada's expert and of Mr. Jeff O'Keefe.

Mr. Jeff O'Keefe testified to a singular expenditure that comprises approximately 30 percent of the Claimant's entire damages case, and yet he was not taken through all of his Witness Statement. I don't know whether there is much to say about it now; but, if the matter does come to damages, I think we will be saying something about it then because we do not feel that his direct evidence was properly tested and maybe should be accepted by this Tribunal.

PRESIDENT GREENWOOD: Well, I think we will take that--we hear what you say, and it will be on the record. If we get to the question of damages,

then we will take that matter up. But the Procedural Order does say that the fact that a witness is not cross-examined on a point does not amount to an acceptance of that point.

Good. Well, in that case, all that remains is, first of all, to thank the Parties and their teams of counsel for all the assistance they have given us during the space of the last week and all the patience and forbearance that they have shown.

May I particularly thank the technical people and those who have borne the literal burden of carrying the enormous lever-arch files to the Tribunal on the occasion of cross-examination.

And, secondly, to thank our Secretary, Lindsey Gastrell, for all the work that she has done, which is ensured that Hearings have run very smoothly, and I think we would all agree that the administration has been first-rate.

To thank ICSID's technical team. We have had, I think, an extremely successful arbitration from the technical point of view. Nothing has broken.

Mr. Kasdan will recall that, I think the last time he and I were in the same room for an arbitration, the power went off on two occasions, completely. The air conditioning failed--this was in a hotel in Turkey--in a windowless basement room without the benefit of the pretty picture at the end, so it's very good, and we are grateful to the technical team for having kept things going.

And lastly, to thank David for having transcribed everything.

Please make sure you go through it quickly to correct any mistakes on the record. The record is--I know you're concentrating now on the questions of law, but the record will be very important on the cross-examination of the witnesses, and it's much easier for it to go wrong when you've got two people speaking than it is when it's a question of counsel addressing the Tribunal. So, please look at that section with great care.

And I wish you all a pleasant journey home; that is to say, if you are able to leave the District of Columbia today, with flash flood warnings and

everything else going on. But if you choose to stay and enjoy the apocalypse over the weekend, I trust you have a pleasant time of that as well. Thank you all very much.

MR. O'GORMAN: Thank you very much, Mr. President.

MR. LUZ: Thank you.

(Whereupon, at 3:55 p.m., the Hearing was concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN